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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1444

AMERICAN ACCEPTANCE CORPORATION,
a Delaware corporation,
Petitioner,

vs.

EDWARD P. SCHOENTHALER and AGNES A. SCHOENTHALER, husband and wife, and WILLIS H. YEAMANS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, AMERICAN ACCEPTANCE CORPORATION, a Delaware corporation, having its principal place of business in Philadelphia, Pennsylvania, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered by

said Court on the 29th day of January, 1968. A petition for rehearing, combining a motion for reference to and consideration by the Appellate Court in banc, was timely filed, and a brief in support of the petition for rehearing and reference to the Court in banc was filed simultaneously therewith. The petition and motion for rehearing in banc was denied by an order of said Court entered on March 27, 1968.

(A) OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida was filed December 2, 1965, and is shown in the printed Transcript of the Record, Vol. III, beginning at page 1080. A copy of the opinion is attached hereto as Appendix "A". A petition for rehearing from that opinion of the United States District Judge was timely filed (Tr. Vol. III, p. 1092). An order of the District Court denying the motion for new trial was filed December 23, 1965 (Tr. Vol. III, p. 1120). A copy of said order is attached hereto as Appendix "B".

The opinion, judgment and mandate on appeal, dated January 29, 1968, is shown at page 1157 of the supplemental certified record, and a copy thereof is attached hereto as Appendix "C". The petition for rehearing, combined with a motion for reference to and consideration by the Court in banc, is a part of the supplemental certified record beginning at page 1188, and the supporting brief is shown at page 1211. The order of March 27, 1968, denying the petition for rehearing and for rehearing in banc is shown in the supplemental certified record at page 1282, and a copy thereof is attached hereto as Appendix "D".

(B) JURISDICTION

(1) The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on the 29th day of January, 1968 and recorded on the same date, and a copy thereof as above referred to is attached to this petition as Appendix "C".

(2) The petition for rehearing was timely filed and said petition for rehearing was denied on March 27, 1968, and a copy thereof is attached hereto as Appendix "D".

(3) This petition is timely filed under Title 28, U.S.C., Section 2101(c). Jurisdiction conferred on this Court to review the judgment or decree in question by writ of certiorari is conferred under the provisions of Title 28, U.S.C., Section 1254(1), as a certiorari from the final judgment or decree by the United States Court of Appeals for the Fifth Circuit.

(C) QUESTIONS PRESENTED

This case involves the construction of a Florida Statute, Chapter 687.07, F.S.A., commonly referred to as the criminal and forfeiture usury statute of Florida, which is as follows:

> "687.07 **Forfeiture and penalty in case of excessive interest or charges.**—Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees or otherwise, or for forbearing to enforce the collection of such moneys or other-

wise, shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than one hundred dollars, or be imprisoned in the county jail not more than ninety days."

The Maxwell Company, a Florida corporation, having its principal place of business in Miami, Dade County, Florida, was in the business of selling hotel, motel and commercial building furnishings and equipment on a commercial or wholesale basis and did a large business throughout the State of Florida. Edward P. Schoenthaler had under construction a motel at Naples, Florida, and he required complete furnishings and fixtures for the motel and for restaurant equipment in said motel. The terms of his first mortgage financing, then of record in the spring of 1964, required that the first mortgagee have a first mortgage not only on the buildings, but upon the complete furnishings and fixtures.

Schoenthaler approached Maxwell for a bid on the furnishings and fixtures and discussions were had with reference to the complete furnishings for the project. The estimation of the minimum cash sale price was $180,000.00, and the time sale differential for a 60-month payment, without interest, was $238,546.00. Schoenthaler could not give or enter into a retention title contract, because under the first mortgage of record the first mortgagee was entitled to a prior lien. He could not give a second mortgage because Willis H. Yeamans, the original owner of the land, held a second purchase money mortgage subordinated to the first mortgage in the amount of approximately $120,000.00. Schoenthaler had other minor obligations for expenses in the overall completion of the motel project.

Schoenthaler requested the aid and assistance of Maxwell to see if secondary additional financing could be ar-

ranged in the amount of $170,000.00. This was not in the line of business of Maxwell, but the Maxwell Company did agree that they would arrange financing for these collateral and secondary purposes to the extent of $170,000.00. That was to be on a straight simple interest of 10%, payable in installments. Schoenthaler elected to buy the furniture on the deferred payment plan and to borrow $170,000.00 in cash. This arrangement was consummated, the furniture was delivered and installed, the $170,000.00 was made available either in cash or to the credit of Schoenthaler, and Schoenthaler arranged for $100,000.00 of the $170,000.00 loan to be paid to Willis H. Yeamans for the release of his purchase money second mortgage. Schoenthaler used the balance of the $170,000.00 for additional supplies, furnishings and equipment not covered in the original time sale, plus the use of additional operating capital. The only money received from Schoenthaler out of the $170,000.00 cash advance was for some extra equipment for the restaurants in the amount of approximately $38,112.18.

A second mortgage on the land, buildings and total furnishings was then given to Maxwell securing the two transactions, one the note for $238,546.00, not bearing any interest, and a note for $170,000.00, representing the cash loan which carried simple interest at 10%, without any prior discount. The mortgage secured the lien of the furniture sale and the lien of the cash advance. Under the then existing law of Florida each of these transactions, considered separately, did not and could not have violated the criminal usury statute above set forth. The time sale of furniture was valid under all of the Florida decisions and was not affected by the usury statute. The loan of $170,000.00 in cash for a 10% simple interest did not violate any Florida statute.

At the time of closing the petitioner, American Acceptance Corporation, a Delaware corporation, having its principal place of business in Philadelphia, Pennsylvania, and which corporation was not authorized to do business as such in Florida and was not doing business in Florida, agreed to lend The Maxwell Company certain sums of money and to take an assignment of the mortgage and the two separate notes as collateral security on a price or contract between American Acceptance and the Florida corporation, The Maxwell Company, which was not violative of any of the Florida statutes. There was no privity between American Acceptance, which was doing business solely with Maxwell, and the mortgagors, Schoenthaler and wife. At the time of the transaction between Maxwell and American Acceptance there were no statutes and no Court opinions of Florida which rendered the transactions between American Acceptance and Maxwell subject to any violations of the usury statute. At the same time there were no Court decisions or statutes of Florida which rendered the transaction between Maxwell and the Schoenthalers subject to any usury violations of Florida on either one of the two transactions.

The United States District Judge, Southern District of Florida, as well as the United States Court of Appeals for the Fifth Circuit, recognized those basic principles of law. However, the lower Court, as affirmed by the United States Court of Appeals for the Fifth Circuit, conceived or created a new relationship, without any statutory authority, because of the association under one mortgage of the two separate considerations, and held they had the right to combine the two separate transactions into one transaction as a loan transaction, disregarding the separateness of the time sale price of the furniture transaction and treating the entire transaction as a single loan. The Court applied the time sale price differential as coming within the

usury statutes and concluded that there was in this combination interest exacted under the contracts in excess of 25%, which was a criminal act requiring forfeiture under Chapter 687.07, F.S.A.

Under the basic decision by this Court in *Hogg* v. *Ruffner* (see S.C., 1 Black 115-121), 66 U. S. Supreme Court Reports, 17 Law Ed. 38, in analyzing an Indiana statute of similar import, this Court held that a time sale differential price for the sale of the property, both real and personal, could not be held to be included as being under the provisions of a usury statute where the usury statute controlled only where there was a loan for a sum of money in one instance, or some transaction which involved an extension of time in the enforcement of a loan of a sum of money.

Since that time the United States Court of Appeals for the Fifth Circuit, in the case of *Daniel* v. *First National Bank of Birmingham* (C.C.A. 5), 227 F. 2d 353, and on reconsideration 228 F. 2d 803, construed the federal statute on usury, Title 12, Sections 85 and 86, in such a way that it concluded that a Court, even in the absence of a statutory provision, could apply the federal usury statute to sales contracts on automobile transactions where at or about the time the sales contract was entered into the commercial paper was transferred to a third party, such as the bank in that particular case. This constitutes a usurpation of constitutional rights by a Court in creating a new contract between the parties by implication, and a merger of the transaction between the purchaser and the seller and the subsequent assignment of the purchaser's commercial paper to a third party into one transaction. That is the same doctrine which the United States District Court adopted in this case and which was affirmed by the United States Court of Appeals for the Fifth Circuit, with-

out any statutory authority in Florida other than their purported construction of Chapter 687.07.

The United States Court of Appeals for the Seventh Circuit, in the case of *In Re Oakes*, 267 F. 2d 516, which involved certain commercial paper growing out of the purchase of a precut house, construed the Illinois law by holding that the transaction simply evidenced the time price differential for the sale of property, and that the Courts could not assume the responsibility, without statutory authority from the statutes of Illinois, to treat that transaction as a loan for the purpose of determining whether the differential on the time sale price was under the usury law of Illinois.

The Indiana statute construed by this Court in the *Hogg* v. *Ruffner* case, supra, and the Illinois statute are identical in substance with the Florida statute, with the possible exception that the Florida statute, Chapter 687.07, which has been invoked in this case, is much clearer in its wording, which is as follows:

> "Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, * * * shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor."

In the Seventh Circuit decision (*In Re Oakes*, 267 F. 2d 516, 519, text p. 519), the Court quoted with approval from prior decisions of the Supreme Court of Illinois, and pointed out that at the time the transaction in that case

was entered into on July 28, 1956, the parties under the then existing Illinois law could make such bargain or contract for sale of property as they desired, and it made no difference whether the time price differential on this sale of property exceeded the usual rate permitted for a loan of money. The Court quoted with approval this statement:

> "'Discounts, at a rate greater than legal interest, for payment before the credit expires, are constantly allowed in commercial transactions with no thought of usury.'"

It is significant to note in that decision rendered in 1959, that it was disclosed that the State of Illinois on January 1, 1958, had passed a limited law governing retail installment sales and affording regulation of this type of commercial credit. The Seventh Circuit concluded that it did not have the power without statutory amendment to the Illinois law to hold that under the established commercial practice pertaining to time differential sales of personal property the usury statutes of Illinois were violated, and said: "we believe it should be done by the legislative process rather than by judicial decree."

Thus there is a dead conflict between the construction of "sales against loans" by this Court in the *Hogg* v. *Ruffner* decision, supra, and the Illinois case of *In Re Oakes*, supra, and the construction placed upon the same subject matter by the United States Court of Appeals for the Fifth Circuit in this case.

The question is squarely presented as to whether the action of the United States Court of Appeals for the Fifth Circuit in placing a new construction, or in fact making a new contract, between the parties, is violative of the United States Constitution, Article I, Section 10, denying the parties the right to contract, and whether that usage

or conclusion by the United States Court of Appeals for the Fifth Circuit does not actually violate the constitutional rights of this petitioner, by the denial of equal protection of the law and the taking of property without due process.

If the doctrine of this Court in the *Hogg* v. *Ruffner* case and the doctrine of the United States Court of Appeals for the Seventh Circuit in the case of *In Re Oakes* is correct, then the only way this new doctrine could be applicable would be if the legislature of Florida had prior to the commencement date of this transaction on April 29, 1964, passed additional statutory prohibitions on time sales pertaining to personal property. Admittedly that was not done. Even if the Florida legislature had thereafter amended the law so as to include time sale differentials as a part of the usury statute, that statute could certainly have no retroactive or ex post facto effect.

In the case at bar, when this transaction was consummated in the spring and early summer of 1964, the contracts between Maxwell, as the seller of the furniture, and the Schoenthalers, as the purchasers, were clearly not covered by any usury laws of Florida. There were no decisions of the Florida Courts which had ever construed a legitimate or valid sales contract with a time price differential as being controlled by the usury laws. There were no statutes or Court decided cases in Florida which would have been notice or knowledge to the petitioner, American Acceptance Corporation, that there was any purported violation of any of the laws of Florida, either statutory or Court decisions. Since it was doing business in interstate commerce it should not and could not constitutionally be charged with knowledge that the federal Courts, to-wit: the United States District Court, Southern District of Florida, or the United States Court of Appeals for the Fifth Circuit, could adopt a new theory late in

1965 and apply that retroactively or ex post facto to its transaction consummated in the early part of 1964 and create forfeiture and criminal penalties, thus giving an effect to a subsequent Court interpretation by the District Court having an ex post facto effect that could not have possibly been inflicted if the legislature of Florida had amended the law in 1965 in that respect.

In the opinion of the *In Re Oakes* decision, the United States Court of Appeals for the Seventh Circuit, as contained in note "1", page 519 of 267 F. 2d said:

> "For interesting discussions with reference to proposals that courts judicially declare that finance charges come under the prohibitions of usury statutes, we have been referred to the note 'Judicial and Legislative Treatment of "Usurious" Credit Sales', 71 Harv. L. Rev. 1143 (1958), and a case note on the application of usury statutes to credit sales in 57 Mich. L. Rev. 298 (1958)."

The second point, which is subsidiary to the main question above raised, is the fact that the Supreme Court of Florida had for many years, beginning with the case of *Mitchell* v. *Doggett*, 1 Fla. 356, as well as the case of *Benson* v. *First Trust & Savings Bank*, 134 So. 493, consistently construed the wording of Chapter 687.07 to mean that the Florida statute was only susceptible of one construction, because it specifically referred only to a loan of money in which the lender shall wilfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to 25% upon the principal sum loaned.

It has been pointed out in the cases above mentioned, particularly in the *Benson* case, that the use of the words "charge and accept a sum of money" in a penalty or criminal statute are derogatory of the common law doc-

trine, and could not be construed to hold that a mere contract to pay, which was never paid, could be the basis of a violation of that statute.

The United States Court of Appeals for the Fifth Circuit, in the case of *Conner Air Lines, Inc.* v. *Aviation Credit Corporation* (5 Cir. 1960), 280 F. 2d 895, clearly reestablished that construction of the Florida statute. In the opinion involved in this case, the United States Court of Appeals for the Fifth Circuit departed from the existing law, and in a note on page 25 of its opinion said:

> "We are mindful of our decision in *Connor Air Lines, Inc.* v. *Aviation Credit Corporation,* 5 Cir. 1960, 280 F. 2d 859, cert. den. 364 U. S. 911, wherein the opposite construction was placed on the Florida usury statutes. However, the more recent Florida decisions just discussed place a different interpretation on these statutes. *Erie* requires us to follow the Florida decisions."

After the *Benson* decision in 1931 the law of Florida was consistent with the holding in that case; that is to say, that a mere contract to pay excessive interest is not covered in the forfeiture and criminal statute, and that there must be an actual charge or acceptance of a sum of money at that time.

In 1956 the Supreme Court of Florida, in the case of *Shorr* v. *Skafte,* 90 So. 2d 604, by a division opinion of four Justices, held that where a lender took a note for $6,000.00, payable on or before six months, and only loaned $5,000.00, that in a subsequent suit where the holder of the note sought to recover the $6,000.00, plus interest thereon, this was a contrivance or device and that since the interest rate was in excess of 40% and the holder of the note made demand, it amounted to a taking or acceptance under the construction of Chapter 687.07. Nowhere in the opinion

is there any discussion of a difference of the provisions in Chapter 687.07, which is a forfeiture or criminal usury statute, and Chapters 687.03 and 687.04, which provide for simple forfeiture of interest and other penalties.

In the *Shorr* v. *Skafte* case the Supreme Court did not even mention the *Benson* decision and apparently did not purport to overrule the *Benson* doctrine, but simply applied the forfeiture rule without ever analyzing the statute. That case was never construed to mean that Chapter 687.07 could be violated by a mere contract to pay interest in the future. There had to be an actual charge or acceptance, namely, a payment of something by the borrower and an acceptance by the lender, before the forfeiture and criminal statute was applicable.

The United States Court of Appeals for the Fifth Circuit, in the case of *Conner Air Lines, Inc.* v. *Aviation Credit Corporation,* supra, clearly made that distinction in 1960 even in the construction of Chapter 687.04. The holding in that case would be applicable to the same charge or acceptance features of Chapter 687.07.

In the present opinion the United States Court of Appeals for the Fifth Circuit now abandons its construction of the Florida law in the *Conner Air Lines* case, and holds that it was required to do so because the Supreme Court of Florida in a later decision in 1962, *Home Credit Company* v. *Brown,* 148 So. 2d 257, had changed and departed from the long line of decisions, including the *Benson* case and subsequent decisions. The petitioner has contended in its petition for rehearing in the Appellate Court and in the supporting brief (Cert. Supp. R., pp. 1188 and 1211) that such a conclusion is not justified. The petitioner has contended that the doctrine of the *Benson* case and subsequent cases is still the law of Florida, and that the construction placed on the Florida Statutes in the *Conner Air*

Lines case was and still is the proper construction of the law of Florida. There is not one reference in the *Home Credit* opinion that makes a bona fide and fair sale of personal property on a time sale differential subject to the usury laws of Florida, and in particular Chapter 687.07. This will be covered later in our argument under Subdivision (H) of this petition.

The third question presented, which is subsidiary to the main question above raised, is shown in paragraph 5, on page 28, of the opinion of the United States Court of Appeals for the Fifth Circuit. The contention was made in the lower Court decree that in looking behind the whole transaction, the consideration was $180,000.00 in the admitted cash price of the personal property sold and $170,000.00 in the cash advanced, or a total of $350,000.00. The lower Court had associated or consolidated the two separate transactions and cast the furniture deal into a loan with the $170,000.00 cash loan; $100,000.00 of the cash loan was credited to Schoenthaler, together with the additional $70,000.00; and Schoenthaler in effect transferred that money to Willis H. Yeamans in satisfaction of the Yeamans purchase money second mortgage. Yeamans had entered into a guaranty contract between Maxwell, Schoenthaler and Yeamans where Yeamans would guarantee the first payments to Maxwell and in effect subordinate his right to the physical possession of the $100,000.00 until Schoenthaler had made certain stated payments on the mortgage. Yeamans had agreed that this $100,000.00 under the guaranty agreement would be placed on deposit with American Acceptance Corporation, for which American Acceptance agreed to pay 4% interest on the deposit. Maxwell actually funded to Schoenthaler, the mortgagor and purchaser of the furniture, the entire $350,000.00. Schoenthaler then transferred to Yeamans $100,000.00, and as an outside transaction Yeamans then

pledged that $100,000.00, which was his own money, as collateral to secure the first few payments.

The lower Court concluded that this circular payment and treatment of the $100,000.00 between Maxwell and Schoenthaler only constituted a net funding of $70,000.00 of the $170,000.00 cash loan. The lower Court then applied the usury rate, treating the entire transaction as a simple loan and not two transactions, and said that the interest of 10% contracted for on the $170,000.00 loan, added to the time sale differential price, or the difference between the $180,000.00 cash price and $238,540.00, which was the time sale price, constituted a charge or acceptance of more than 25%, but was based only on the $250,000.00 computation. On the one hand, all of the parties, including the lower Court, held that the title to the $100,000.00 actually passed to Willis H. Yeamans, which would be a consummation of the entire loan of cash or property advanced of $350,000.00.

There was no contention by American Acceptance, or by anyone in the case, that the $100,000.00 was not funded to Schoenthaler and then in turn paid to Willis H. Yeamans, thus calling for a satisfaction of his second mortgage. As the acknowledged owner of the $100,000.00, Yeamans then repledged that—not to Maxwell, but to American Acceptance Corporation, which had taken or had agreed to take an assignment of this commercial paper as collateral in the transaction with Maxwell, the seller of the furniture.

If the $100,000.00 passed to and belonged to Yeamans, the only way he could have received that money was from Schoenthaler, and the only way Schoenthaler received that money was from Maxwell. Therefore, the lower Court used the basis of $250,000.00 for a computation of usury, but ignored the other $100,000.00 in the computation of usury and ordered that American Acceptance not only for-

feit its claim to the $250,000.00 under the usury statute of Florida, but simultaneously ordered the specific performance of the alleged loan agreement, requiring the payment of that $100,000.00 to Willis H. Yeamans.

The question presented is that under the usury statute of Florida, Chapter 687.07, the sole and only penalty is the forfeit of the entire sum loaned, both principal and interest. If all other factors in the case are eliminated from consideration by this Court, then only $250,000.00, and any interest accruing thereon, could be forfeited. The answer to that problem is contained in the very last paragraph, on page 30, of the opinion of the Appellate Court, wherein it was said:

> "It was obviously the conclusion of the District Court that the $100,000 was part of the principal amount of the loan, although the loan was never funded with that amount so as to make interest computations allowable thereon. The fact that the loan was never funded with the $100,000 does not mean that that amount would not be forfeitable under 687.07. The $100,000 had to be either principal or interest. Whichever it was, it is forfeitable if the entire transaction is found to be criminally usurious."

No authority was quoted in the opinion of the lower Court or in the opinion of the Appellate Court, and there was no reference to a statutory provision of Florida to sustain not only the forfeiture of the funded part of the loan, but authorizing now the payment to Willis H. Yeamans, which would have completed the funding of the entire loan. If this funds the $350,000.00 portion, then there is no usury.

If this Court finds that on the first question presented the time differential on the sale of personal property is not within or covered by the Florida usury statute, then it would not be necessary to pass on the second and third questions as there would be no possible usury involved in the case in such an instance

(D) CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS

The portions of the United States Constitution relied upon are as follows:

Article I, Section 10, Paragraph 1, as follows:

> "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

That portion of the Fifth Amendment to the Constitution of the United States, as follows:

> "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VIII to the Constitution of the United States, as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV to the Constitution of the United States, Section 1, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statute, Chapter 687.07, which has been copied in full in Subdivision (C), Questions Presented. All of the pertinent provisions of the Florida usury statute which cover Chapters 687.03, 687.04 and 687.07 are attached hereto as Appendix "E".

(E) CONCISE STATEMENT OF FACTS

We submit an analysis of the facts upon which this litigation was presented and determined by the United States District Court, Southern District of Florida, because we do not feel that said Court in its opinion, beginning on page 1080 of the Record (App. A), gave proper consideration to all of the Record, which consisted, as set forth in the Court's own opinion, of the pretrial stipulations, exhibits, pleadings and depositions. There were no live witnesses or personal testimony presented for the Court's consideration, so that this Court has before it the exact record, exhibits, depositions and pretrial stipulations that were presented to the lower Court.

Referring now to the opinion of the lower Court, beginning in the Record on page 1081 (App. A), there are certain conclusions which that Court reached and we think the preliminaries to those conclusions which the Court reached should be pointed out to this Court. In substance, prior to April 28, 1964, Willis H. Yeamans owned certain property in the City of Naples, on the west coast of Florida, and he had conveyed that property to Edward P. Schoenthaler and Agnes A. Schoenthaler, and in consideration therefor the Schoenthalers executed and delivered to

Willis H. Yeamans a purchase money mortgage in the approximate amount of $119,500.00, securing a note in that amount which bore interest. The record does not disclose whether the Schoenthalers paid any cash consideration. This whole transaction, if not actually a joint venture, was the result of a very close relationship between Yeamans on the one hand as the owner of the property and the Schoenthalers on the other hand as the developers, because more or less simultaneously therewith Yeamans subordinated the lien of his purchase money mortgage to a construction money mortgage given in favor of the First National Bank of Miami, Florida, in the amount of approximately $1,350,000.00, and accompanied with that mortgage was a takeout of the mortgage agreement with the Trustees of the Central States, Southeast and Southwest Area Pension Fund. The peculiarity in the agreement was that the moneys to be advanced by the First National Bank of Miami were for the sole purpose of constructing a motel which was to be built in accordance with certain plans and specifications to be filed with Real Estate Research Corporation, the real estate appraiser for Central States, Southeast and Southwest Area Pension Fund. The commitment for the takeout of the construction money mortgage was conditioned upon the completion of the building and the installation of complete furnishings. These were required to be free and clear of lien so that at the time the Pension Fund could be called upon by the bank to take over the mortgage the building would have to be completed and furnishings installed, free and clear. The mortgage held by the First National Bank was to be assigned to the Pension Fund on a permanent financing first mortgage basis and was to encumber on a first lien basis not only land and buildings, but also all of the personal property which would constitute the furnishings and effects thereof.

It became apparent prior to April 28, 1964, that there was not enough money either in the possession of the Schoenthalers or coming out of the construction money to even complete the specifications and requirements of the first mortgage, and it was at that stage of the proceedings that Schoenthaler for the first time negotiated with The Maxwell Company of Miami, Florida, a large commercial furniture company which specialized in furnishing motels and hotels, as distinguished from a retail furniture company. The type and quantity of furniture Schoenthaler wanted to purchase from Maxwell included practically all of the furniture, fixtures and equipment required for complete compliance with the requirements of the first mortgage, with the exception of kitchen equipment which Schoenthaler had already purchased, but had not paid for, from an outside source. The amount of the furniture negotiated with Maxwell had a cash price of $180,000.00, and these individual items are shown in detail in the Record in Volume III, pages 892 through 958, which shows the actual signed orders, whereas in Volume I of the Record, pages 33 through 52, the invoices of Maxwell were set forth.

The lower Court merely mentioned some of this background in the opinion (Tr. 1081 and 1082, App. A), but the details as we have set forth herein were not mentioned by the lower Court in specific application to its findings. The said Court did find (Tr. 1082, App. A) that Schoenthaler had two distinct motives in dealing with the Maxwell Company, one for the purchase of the furniture and the obtaining of an absolute bill of sale therefor, which he was required to have, and the other for the cash out of which he could arrange for the satisfaction of the second mortgage held by Yeamans and to provide himself with cash to operate the motel.

The negotiations which had started prior to April, 1964, between Schoenthaler and Maxwell, culminated in a written agreement (Tr. 114), known as the commitment letter, which is the controlling factor in the determination of this case and is the agreement which is briefly mentioned by the District Court in its opinion on page 1082 of the Record (App. A).

This agreement was in the nature of a letter proposal signed by Maxwell, the Schoenthalers and Yeamans, wherein the parties agreed that Maxwell would sell furniture at the cash price of $180,000.00, or if purchased by Schoenthaler, on a deferred payment plan at the price of $238,000.00, payable without interest in equal monthly installments. In addition, Maxwell agreed to lend Schoenthaler $170,000.00 cash, which was to be evidenced by a promissory note bearing 10% interest. Both notes would be secured by Schoenthaler executing a second mortgage on the land, buildings and furniture, and guaranty agreements and endorsements from two parties who, in addition to Schoenthaler, were benefiting by the sale of the furniture and the lending of the money on the terms stated. The first guaranty of $150,000.00, as evidenced by their endorsement on the notes, was given by Congress International Inns, Inc., under which name the motel was to be operated. The second guaranty was to be a personal guaranty of Yeamans, who was interested in the transaction to the extent of getting his purchase money mortgage satisfied. The agreement further provided that Schoenthaler fully comply with the original commitment letter of October 11, 1962, by Central States, Southeast and Southwest Areas Pension Fund to Edward P. Schoenthaler (Tr. 118-119). This original commitment had been accepted, and under that commitment Schoenthaler had bound himself to carry out the full details, and Yeamans had become bound by that commitment because he subordinated his

purchase money mortgage as a condition to that commitment. This Court will note that between October 11, 1962 until April 28, 1964, some eighteen months had passed, at which time efforts were being made by Schoenthaler to complete the buildings, and by that time Yeamans was involved and so was Congress International Inns, Inc.

The other facts are set forth in detail in the letter proposal (Tr. 119). This actual commitment from Maxwell had first been approved by Dr. Willis H. Yeamans on April 23, 1964, at Fort Lauderdale, Florida, and was then actually signed by Maxwell and the Schoenthalers on April 28, 1964, at Miami, Florida, and accepted by Congress International Inns, Inc. on the 30th day of April, 1964. Yeamans had been an integral party in the final negotiations which led up to the four-party commitment and agreement. This Court will note, as reflected in the Record at page 33, that immediately upon the execution of the four-party agreement Schoenthaler gave a series of orders to Maxwell beginning April 30, 1964, which was the final date when Congress International Inns, Inc. accepted the four-party agreement. The petitioner, American Acceptance Corporation, was not a party to this four-party agreement and it was not until the 26th day of May, 1964, or twenty-six days later and after orders had been placed and deliveries made, when American Acceptance Corporation, a financial institution, came into consideration on the guaranty agreement. There is no dispute as far as American Acceptance is concerned that it had prior thereto been approached by Maxwell for financing to Maxwell in connection with the transaction Maxwell had entered into with Schoenthaler and that American Acceptance was advised as to the form of the notes that would be executed by the Schoenthalers and the general basis of the financing and security arrangements. It knew about the commitment agreement of April 28, 1964, entered into between

Maxwell and Schoenthaler, but it did not have any direct or indirect participation or negotiation with any other party than Maxwell. At the time this agreement of April 28, 1964, was entered into no specific institution had been designated as the escrow agent.

The terms and conditions of the commitment letter were consummated with the delivery of the furniture to Schoenthaler, the endorsement of the notes by Congress International Inns, Inc. and the execution by Schoenthaler of the guaranty escrow agreement (Tr. 122). The guaranty escrow agreement provided that the money which Yeamans was required to post with an escrow agent as security for his guaranty was to come out of the proceeds of Maxwell's $170,000.00 loan to Schoenthaler, from which loan Schoenthaler had to satisfy the Yeamans mortgage. By the terms of this guaranty escrow agreement both Schoenthaler and Yeamans assigned this $100,000.00 to the escrow agent yet to be named.

In the agreement of May 26, 1964 (Tr. 125), it had been provided that this $100,000.00 escrow would be placed with a financial institution, but it was not upon any request or demand of American Acceptance that it had to be the escrow agent. American Acceptance Corporation, as shown by the undisputed testimony in the deposition of John M. Lowe, vice president of Maxwell Company, and in particular as reflected on page 722 of the Record, had entered into an agreement with Maxwell to lend it the sum of $350,000.00, and that as security for that loan the collateral assignment of the Schoenthaler notes and mortgages, endorsed by Maxwell with full recourse and as further evidence of the debt, received a promissory note executed by Maxwell in the amount of $350,000.00. This note was based upon a fixed fee contract which had been in force and effect between Maxwell and American Ac-

ceptance on many other prior transactions wherein Maxwell paid American Acceptance approximately 5% add-on interest (Tr. 390). Mr. Lowe, comptroller for Maxwell, testified in his deposition (Tr. 723) that the standard rate which Maxwell charged as a time differential price used on furniture sales was at an approximate rate which was called "6% add-on". He pointed out that this was the usual practice even though each transaction with their purchasers was separately negotiated, and he stated that the 6% add-on on the furniture sale so far as Schoenthaler was concerned was the approximate standard, and so far as he knew that was what had been charged.

On page 724 of the Record, in Mr. Lowe's deposition he said that on some smaller transactions the computation on furniture sales ran as high as 6¼% add-on, and he explained the transaction further by stating that when the time charges received from the purchaser were received and paid where the paper had been assigned to American Acceptance, then there was an accounting between Maxwell and American Acceptance and if the amount received from the customer on the time sale charges exceeded the basic 5% add-on interest charged to Maxwell, then American Acceptance rebated to Maxwell, or if those amounts did not exceed or were in fact less than 5% add-on Maxwell repaid the difference to American Acceptance. Mr. Lowe established without any contradiction in the Record (p. 725) that this was the whole basis for the handling of this assigned financing with American Acceptance and that in no event under his computations could American Acceptance by contract or otherwise receive more than this amount of $350,000.00, plus the 5% add-on computations. Mr. Lowe also established (Tr. 726) that it was Maxwell's practice to cooperate and work with American Acceptance in the event of any defaults, and that in

many instances where there were defaults Maxwell would then repurchase or have a retransfer of the particular account back in the name of the Maxwell Company.

In the testimony in the deposition of Mr. Toby Carroll, attorney for Dr. Yeamans and also for the Schoenthalers (Tr. 570), Mr. Carroll stated that on or about the 26th day of May, 1964 he had some discussions with Mr. Aaron Kanner, the attorney for Maxwell Company, and had discussed the actual party who would hold the $100,000.00 belonging to Dr. Yeamans as the escrow agent (referred to in some parts of the agreement as a bank and other parts as a financial institution) and that he had agreed with Mr. Kanner that American Acceptance "would be okay" (Tr. 573), and he testified that he would then send a wire to Mr. Kanner to that effect. He had mentioned prior thereto (Tr. 572) that he thought the commercial bank rate would be 3½% and that he and Mr. Kanner, Sr. had discussed whether they could get 4% if the money was escrowed with American Acceptance. Nothing had been definitely settled until Maxwell, through J. M. Lowe, vice president, had directed a letter to American Acceptance Corporation, Six Penn Center Plaza, Philadelphia, Pa., Attention: Mr. Elmer Rosenberry, dated June 3, 1964 (Tr. 361), in which Mr. Lowe advised Mr. Rosenberry that a Mr. Logan of American Acceptance had verbally agreed that if American Acceptance was to be the escrow agent they would accept it and pay 4%. In this same letter it is shown that the guaranty escrow agreement was for the first time sent to American Acceptance for its approval.

On June 5, 1964 (Tr. Vol. I, p. 364) the president of American Acceptance Corporation wrote the following letter:

"Mr. John M. Lowe
The Maxwell Company, Inc.
7321 N. E. 2nd Avenue
Miami, Florida 33138

Dear John:

We are returning herewith the original of the Guaranty Escrow Agreement which is to be used in connection with the Schoenthaler transaction.

We understand that if the $100,000 is lodged with us, we are to pay Dr. Yeamans interest at the rate of 4% per annum on this sum, payable quarterly.

Very truly yours,

President."

We have mentioned these portions of the Record because in the opinion of the District Judge (Tr. 1083, App. A) the Court laid great stress upon the assumption that American Acceptance had initially instigated this whole transaction. The District Judge implied that this was a wilful and deliberate scheme whereby American Acceptance would not ever lend more than $250,000.00, but would charge interest on $350,000.00. The money resulting from the Yeamans escrow of $100,000.00 security was never a request or a demand from American Acceptance Corporation. It was a collateral matter entered into after the commitments had been completed and the transactions consummated by the recording of the mortgages on May 26, 1964. We say this confusion in the Record was brought about solely because the District Court found that something that was entirely an aftermath related back and infused the entire transaction with the intent to commit wilful and criminal usury. The District Court said in its opinion (Tr. 1087, App. A):

> "This is a different situation, indeed, than had the plaintiff paid $100,000 to Yeamans and he had then deposited it with a stranger as escrow agent or had the plaintiff itself earmarked and segregated the funds. But it did neither and never did part with the funds."

This Court will note that in the opinion of the District Court, reflected at page 1086 of the Record (App. A), it treated the total funding of this loan by Maxwell to Schoenthaler at $250,000.00, and then by the application of certain mathematical computations the District Court found that based upon $250,000.00, and treating the entire transaction as one loan and not a separate sale and a separate loan, there was usury above the rate of 25%.

We point out as a part of the history of this case, particularly with reference to pages 1086 and 1087 of the Record, that insofar as the Schoenthalers are concerned the District Court found that there was only $250,000.00 actually funded, but that in the next paragraph so far as Yeamans is concerned the District Court treated the funding of the loan at $350,000.00 and directed that the $100,000.00 be then paid from the escrow to Yeamans.

(G) BASIS FOR FEDERAL JURISDICTION IN A COURT OF FIRST INSTANCE

This suit was initially filed in the United States District Court, Southern District of Florida, as a diversity action under Title 28, Section 1332, because the petitioner, American Acceptance Corporation, was a Delaware corporation, having its principal place of business in Philadelphia, Pennsylvania, and all of the defendants were citizens of the State of Florida, and the property sought to be foreclosed was within the jurisdiction of the United States District Court, Southern District of Florida.

(H) REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Under Subdivision (C), Questions Presented, three distinct reasons were assigned why this Court should grant the writ. All three reasons grow out of the interpretation of Chapter 687.07 of the Florida usury statute, commonly referred to as the criminal and forfeiture usury statute.

The first question presented is on the basis that this Court in the case of *Hogg* v. *Ruffner,* (see S.C., 1 Black 115-121), 66 U. S. Supreme Court Reports, 17 Law Ed. 38, construed a similar statute of the State of Indiana to cover only loans for money and interest charged thereon, or interest or charges made for forbearance to sue or collect upon loans of money, and this Court specifically held that statutes of that class and wording could not be extended to time differentials on the sale of property.

The petitioner has shown that the United States Court of Appeals for the Seventh Circuit, in the case of *In Re Oakes,* 267 F. 2d 516, construed a similar transaction under a similar statute of the State of Illinois so that it did not apply to support a usury claim on a bona fide contract for the sale and installation of a pre-cut house. In this case that Court concluded by saying that before such a broad interpretation of the usury statutes would apply to the time sales and time price differentials, it was a matter for the legislature of Illinois to amend its laws and was not for the Courts to rewrite the usury laws or rewrite the contracts between the parties so as to bring about a conclusion clearly not covered in the then existing statutes.

The petitioner then set forth that the United States Court of Appeals for the Fifth Circuit, in construing a similar provision in the federal usury statutes applicable to na-

tional banks had without any statutory modification held that the Court had the right to implement the statute and to construe for equitable purposes a new contract between the parties over and beyond the written agreements, and to construe that the Court had the inherent power to set aside these commercial transactions and to construe a time sale differential price on the sale of tractors as a violation of the usury statutes. This decision is in conflict with the prior decision of this Court in the *Hogg* v. *Ruffner* case, supra, and is in direct conflict with the holding of the United States Court of Appeals for the Seventh Circuit in the case of *In Re Oakes,* supra.

The petitioner contends that the present decision for which certiorari is now sought is in direct conflict with the prior opinion of this Court, as aforesaid, in the opinion of the said United States Court of Appeals for the Seventh Circuit, in that it has even gone beyond the rulings in the previous cases and held that a contract for the sale of personal property on a time price differential, even though it was a valid and bona fide sale, is drawn into and becomes merged into a loan for money, and that even though the loan for money was not usurious and even though the time sale differential was not usurious, the fact that the transactions occurred between the same parties they would be considered as one loan and the time sale differential would be considered as usury applicable to the cash consideration.

In the opinion in *In Re Oakes,* 267 F. 2d 516, the United States Court of Appeals for the Seventh Circuit made particular reference to a comprehensive note in *71 Harvard Law Review, page 1143,* and we refer to a few excerpts from this article. While prepared and published in 1958, the subject matter of the article, the factual background and the various laws applicable are most timely.

The Congress of the United States has been holding public hearings and studying the financing and credit industry as a whole, with the view of preparing or passing remedial legislation on the interstate use of various financing contracts and time sale differentials between a cash sale price and a time differential price. There are very few states where any statutory enactments have been completed, and apparently there is no federal legislation at the present time. The authors of this article say (see page 1143):

> "The problem whether statutes prohibiting usury apply to conditional-sales transactions is of obvious importance in the present period of extensive credit buying. A few states have statutes which expressly forbid excessive interest charges in credit transactions. Most states, however, have statutes which prohibit only in general terms the charging of higher than a stated rate of interest for 'loan or forbearance of money.' In addition to state legislation, a similarly general federal statute prohibits usury on the part of national banks. Whether the framers of these statutes intended them to apply to installment-purchase transactions is unclear. The statutes normally contain no reference to conditional sales and similar installment devices, nor is the matter discussed in any available legislative material. Moreover, most laws against usury antedate the present boom in credit buying.
>
> Until recent years most American courts have consistently held that these statutes do not apply to conditional-sales contracts. The traditional view is that sale-and-purchase arrangements cannot be assimilated to loans and that only loans are covered by the usury statutes. Most jurisdictions adhering to the majority rule add the qualification that there must be a bona fide intent to buy something; the parties will not be allowed to conceal a usurious loan in the form of a conditional sale. In the last few years a number of

courts have had occasion to re-examine the traditional approach and for the first time have found violations of the usury laws in connection with bona fide conditional sales. Minnesota led the way in 1944, followed in 1954 by Arkansas, which prospectively overruled a long line of prior claims. Three more states have adopted this view, and a fourth appears to be wavering. In the leading case of *Daniel* v. *First National Bank*, the Court of Appeals for the Fifth Circuit construed the federal usury provision as applying to a conditional-sale contract discounted by a national bank. This Note will examine the central problem presented by these cases: whether existing usury statutes, designed to protect borrowers, should be construed to apply to consumer-credit transactions."

Later in this note (p. 1145) the authors say:

"Those courts which have found violations of usury laws in consumer-credit transactions have generally qualified the scope of their decisions by adopting the doctrine of 'bona fide time price.' "

The authors make this further comment on page 1148:

"A court convinced that usury legislation should have been applied to conditional sales initially must still face the question whether it is wise to overrule the traditional view now. Since the time the courts first excluded conditional sales from the scope of the usury laws, credit selling and the financing of dealers through the purchase of conditional-sales notes by financing institutions have become a basic feature of the national economy, particularly in connection with the sale of automobiles. In 1956, 63 per cent of all new automobiles and 58 per cent of all used cars sold were sold for credit. In April, 1957, of the 31,532,000,000 dollars in consumer-installment-credit paper outstanding, 14,659,000,000 dollars was automobile paper, of which the vast majority represented conditional-sales contracts. Of the total installment credit outstanding, 27,493,000,000 dollars was held by

financial institutions as compared to only 4,039,000,000 dollars held by retail credit outlets. The commercial banks alone held 11,960,000,000 dollars in installment paper, including 3,713,000,000 dollars in purchased auto paper and 2,313,000,000 dollars in direct auto paper. To the extent that this business has developed in reliance on the traditional judicial view, the argument that a court should be reluctant to change its established position when the statute is at best ambiguous is strong indeed. Unless the impact of a reversal is made prospective only, the result could be disastrous. It seems to be generally assumed that most discounting of conditional-sales contracts by financial institutions is carried on at usurious rates. If, under the Fifth Circuit's test in *Daniel*, this fact is enough to put a bank on notice of usury in the original contract, tremendous numbers of completed transactions would be called into doubt."

We continue to quote from the note at the bottom of page 1148:

> "The long silence of the legislatures in the face of judicial decisions excluding the purchase-transaction field from the scope of usury legislation may also be of some significance. Despite judicial decisions in two-thirds of the states over a period of many years holding usury laws inapplicable, no state legislature has ever specifically subjected installment sales to its general usury law."

There is no Florida statute applicable, and the line of decisions mentioned by the United States District Court in the first opinion in this case conceded that there are many cases in Florida holding that time price sales contracts are not covered by the usury law of Florida. The lower Court conceded that there was no usury involved in the loan of $170,000.00, separate and apart from the sale of the furniture, because that was a simple interest at 10% on outstanding principal balances. However, the lower Court held that where the two matters, one the sale

of the furniture and the other a separate supplemental loan, occurred at or about the same time, a new contract or a new conception is created through the merger or marriage of the two transactions and it became one transaction, a loan.

No cases have been submitted to the Court, nor has our research resulted in the discovery of any cases supporting this doctrine which was affirmed by the United States Court of Appeals for the Fifth Circuit. While the transaction here involved was a usual and customary transaction in interstate financing and was simply a repetition of thousands of similar types of transactions as reflected in the statistics in the Harvard Law Review article, yet the petitioner herein has been inflicted with a loss or penalty of some $400,000.00.

The Supreme Court of Florida in the case of *Yaffee* v. *International Company, Inc.*, 80 So. 2d 910, a 1955 decision, said this in headnote 6:

> "Usury statutes do not have the effect of invalidating contracts for interest at a rate higher than statutory maximum, but only accord to the obligor the personal privilege of setting up or waiving affirmative defenses of usury in respect to such contracts."

This is taken directly from the opinion in paragraph "6", on page 912. In this case it appears that prior to the effective date of Chapter 28170, Laws of Florida 1953, a corporation, as mortgagor or borrower, was not permitted to interpose the defense of usury in any action in any Court in Florida. By the law of 1953 that prohibition was removed. The issue was raised by the borrower, a corporation, which had consummated the loan prior to the change of the law, and the Supreme Court of Florida was required on appeal to review a decision of a state Court which had held that the usury plea could be asserted by a

corporate mortgagor on a transaction consummated before the law was changed. The Supreme Court of Florida reversed that decision, and stated (see paragraph 5, p. 912):

> "This being the nature of corporation contracts made under such a statute, it is plain that however an abrogation of the statute is sought to be accomplished, whether by repeal or by an affirmative enactment, the effect of applying the provisions of the statute retrospectively would be to apply usury penalties to corporate obligations which, when made, were subject only to rules of common law under which interest rates were not limited; and hence such application would be in violation of constitutional provisions which forbid the enactment of laws impairing the obligation of contracts."

The case of *Home Credit Company* v. *Brown*, 148 So. 2d 257, a 1962 decision by the Supreme Court of Florida, was first passed upon by the District Court of Appeal of Florida, Second District, in *Brown* v. *Home Credit Co.*, 137 So. 2d 887. This case in the District Court of Appeal involved the question of whether two notes providing for a 10-year installment payment without interest, if accelerated at the early stage of the transaction (and in this case within four months after they were executed), and where the assignee of the notes filed a suit for the full amount of the notes, plus interest, could by acceleration with the full demand be construed to be usurious. There was no time sale price differential of personal property involved. There was no bona fide sale of any personal property or of any real property involved.

Neither the opinion in the District Court of Appeal of Florida, Second District, or the opinion in the Supreme Court of Florida in the subsequent decision, 148 So. 2d 257, purport to recede from the long line of decisions in Florida, beginning with *Davidson, et al.* v. *Davis*, 52 So.

139; *Perry* v. *Beckerman* (S. Ct. Fla. 1957), 97 So. 2d 860; *B & D, Inc. of Miami* v. *E-Z Acceptance Corporation* (D.C.A.F. 3, 1966), 186 So. 2d 29; and *Connecticut Mutual Life Insurance Company* v. *Fisher*, 165 So. 2d 182, cert. den. S. Ct. Fla. 1965, 171 So. 2d 392. In this latter case the District Court of Appeal of Florida thoroughly reviewed all of the background decisions in Florida, and that Court said (see text, second column, p. 185, 165 So. 2d 182):

> "* * * We are, however, impressed by this record which shows a long time loan on businesslike and customary terms, and the absence of proof of the existence of a corrupt intent to take more than the legal rate of interest for the use of the money loaned. The chancellor appears to have given undeserved significance to the actuarial computation submitted by the plaintiffs in support of their motion for summary final decree, which computation projected the total of the interest that would be payable on the principal and on deferred interest if the specified installments of principal and interest were not paid as contracted for and should be allowed to become and remain in default. * * * 'Usury is largely a matter of intent and is not fully determined by the fact of whether the lender actually gets more than the law permits, but whether there was a purpose in his mind to get more than legal interest for the use of his money.' Therefore, such actuarial computation was without directional force to point out usury in the transaction, in the absence of a showing that it was a scheme or device entered into with corrupt intent to charge more for the loan than the rate of interest allowed by law."

On this phase the Court concluded (text p. 186, first column):

> "* * * If a loan when complied with as agreed upon will not involve an unlawful rate of interest 'the legal consequences of such an arrangement must be tested by the results contemplated by the parties on the as-

> sumption that both lender and borrower will fully carry out their agreement rather than the special results which may follow, but are not necessarily certain to ensue, when the borrower breaches a covenant.'"

The District Court of Appeal of Florida, Second District, which issued the first opinion in the case of *Brown* v. *Home Credit Co.*, 137 So. 2d 887, has just recently on April 24, 1968, issued an opinion, not yet officially reported, *Willie Marvin Lord, et al.* v. *Ernest O. Hodge, Sr.*, a copy of which is attached hereto as Appendix "F". This opinion involved the construction of the Florida usury laws and correctly found that under the law of Florida there are four elements which are essential before the Florida usury penalty statutes apply: (1) a loan, express or implied; (2) an understanding between the parties that the money loaned is to be returned; (3) payment or agreement to pay a greater rate of interest than is allowed by law; and (4) a corrupt intent to take more than the legal rate.

The Court found that the first three elements were present, but it could not assume that those first three elements being present would supply the inference of the fourth requirement, namely, that there must be a corrupt intent to take more than the legal rate and that requirement could only be substantiated by plain and clear evidence. The doctrine of that case fully supports the interpretation placed upon the Florida law of usury by the District Court of Appeal of Florida, Third District, in the *Connecticut Mutual Life Insurance* case, supra.

Referring again to the case of *Conner Air Lines, Inc.* v. *Aviation Credit Corporation*, 280 F. 2d 895 (U.S.C.A. 5, 1960), which case has been receded from or reversed by this last opinion of the United States Court of Appeals, Fifth Circuit, in the case at bar, in that opinion the Court said this (first column, p. 899):

"* * * Authorities are cited showing it to be the law of Florida that the difference between a cash price offered and a credit price agreed upon is not to be regarded as interest so as to invoke the application of the law against usury. Dillon v. J. W. Walter Co., Fla. App., 98 So. 2d 391."

That law of Florida has never been changed, and the opposite conclusion could not be constitutionally or judicially applied in the case at bar, unless the United States District Court, Southern District of Florida, and the United States Court of Appeals, Fifth Circuit, in the opinion sought to be reviewed had actually made a finding of fact based upon competent evidence that this sale of furniture and fixtures by Maxwell to Schoenthaler was only a pretended or fictitious sale. There was no evidence and no finding by either the trial Court or the Appellate Court, because such a finding would have been contrary to the undisputed documentary evidence as reflected by the letter of July 9, 1964, from Edward P. Schoenthaler and Agnes A. Schoenthaler, his wife, to The Maxwell Company, Inc., which is set forth in Volume I of the printed record, at page 188, and which is as follows:

"July 9, 1964

The Maxwell Company, Inc.
P.O. Box 38-278
Miami, Florida

Gentlemen:

Your company heretofore, under date of April 28, 1964, delivered to the undersigned a commitment letter wherein you agreed to sell to us certain furniture, fixtures and equipment for a deferred purchase price of $238,484.14, and to also loan to us the sum of $170,000.00 in cash. In connection with this commitment and as security for the indebtedness which we owe to you of $408,484.14, we have delivered to you two promissory notes, one for $238,484.14, which said note bears interest after maturity at the rate of ten

(10%) per cent per annum, and the other note for $170,000.00, which note bears interest from date at the rate of ten (10%) per cent per annum, payable monthly. As security that the aforesaid notes will be paid according to the tenor thereof, we have delivered to you our mortgage encumbering the land and property at premises generally known and identified as 'Old Cove', Naples, Florida, and also known as Tahitian Cove Congress Inn, Naples, Florida, and our chattel mortgage encumbering the furniture, fixtures and equipment installed at the said premises aforesaid. The land mortgage has been recorded in the Public Records of Collier County, Florida, in Official Records Book 168, at Page 497 thereof. The chattel mortgage, at our request, has not been recorded to date.

We acknowledge receipt from you today of Bill of Sale covering said personal property referred to in the commitment and which said Bill of Sale also covers additional personal property in excess of the amount referred to in said commitment, and we also acknowledge receipt from you today of the sum of $37,112.18, which has been delivered to us in the form of a check dated the 29th day of June, 1964.

We acknowledge that the commitment has been discharged by you in the following manner:

(a) By Bill of Sale to furniture to the amount of $238,484.14 purchase price, based on purchase price being paid in sixty (60) equal monthly instalments commencing August 1, 1964.

(b) By Bill of Sale to additional purchase of furniture not included in Item (a), for which we are paying cash, this item being a charge against the $170,000.00 cash loan, this purchase totaling $32,887.82.

(c) check this date received in the amount of $38,112.18.

(d) $100,000.00, which has been deposited with American Acceptance Corporation, as per Dr. Yeaman's Guaranty Agreement.

We acknowledge that you have fully complied with each and every item as required to be done by you under the terms of your commitment to us; that, with the exception of that furniture to which reference will be hereafter made in this letter, you have fully delivered to us all items of personal property purchased by us from you; that such personal property has been installed at the Tahitian Cove Congress Inn at Naples, Florida, and is now at said premises, this said location being the same premises as described in the real estate mortgage which we gave to you; that, in all respects, you have fully discharged all of the requirements of the commitment to us, including the installation and delivery of personal property to our motel within the time limits required in the commitment. We acknowledge that certain of the said personal property was not delivered by June 1, 1964, but at a subsequent date thereto, and we specifically do hereby release you from any right, claim, demand, or liability to us by reason thereof. We acknowledge that we have no right, claim, demand or offset against the payment of the sums of money required to be paid by us under the terms of the notes and mortgages hereinabove referred to.

We acknowledge that the indebtedness evidenced by the promissory notes and secured by the land mortgage and chattel mortgage aforesaid is a valid, outstanding indebtedness due and payable by us to you or your assignee, and that we have no offset, counterclaim or defense to the payment of the same whatsoever, and that our indebtedness, as evidenced by said promissory notes and mortgages, is absolute in every respect.

In reference to furniture which has not been delivered, the same consists of furniture for the lobby of the motel and chairs for the bar in the Cove restaurant. We understand these items are on order and will be delivered to us as soon as received by you. There is also some miscellaneous small items which you will deliver as soon as received. We acknowledge

that the non-delivery to this date is not occasioned through any fault of yours and we acknowledge that we have no claim against you because of the non-delivery of the same to date. We also recognize that it may be one month before complete delivery has been effectuated.

Very truly yours,

EDWARD P. SCHOENTHALER
and
AGNES A. SCHOENTHALER,
(Seal) By EDWARD P. SCHOENTHALER."

Respectfully submitted,

.....

WILLIAM GRESHAM WARD
1240 duPont Building
Miami, Florida 33131

.....

RICHARD AARON KANNER
1150 N. W. 14th Street
Miami, Florida 33136
Attorneys for Petitioner, American Acceptance Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed on the ..... day of May, 1968, to Thomas A. Horkan, 236 Security Trust Building, Miami, Florida, attorney for Edward P. Schoenthaler and Agnes A. Schoenthaler, husband and wife, and Morgan, Carratt & O'Connor, 605 Kennan Building, Fort Lauderdale, Florida, attorneys for Willis H. Yeamans.

.....

WILLIAM GRESHAM WARD

APPENDIX A

Opinion

Filed Dec. 2, 1965.

(Title Omitted.)

This suit by plaintiff, American Acceptance Corporation, initially sought to foreclose a real and chattel mortgage held by it as assignee of The Maxwell Company (the original mortgagee) on certain property (the description of which is now immaterial) against Edward P. and Agnes A. Schoenthaler as mortgagors and divers defendants who claimed an interest or lien upon the property in question. These mortgages and claims were inferior to a first mortgage held by Central States, Southeast and Southwest Areas Pension Fund, and plaintiff's second mortgage liens on the property which secured the notes in question, as well as the claims of the other defendants, were extinguished during the course of these proceedings by the foreclosure of the first mortgage in a state Court. Thus, the only issue remaining as between the plaintiff and defendants Schoenthalers is as to the amount owing, if any, on the two promissory notes formerly secured by the mortgages—the Schoenthalers asserting their invalidity because of civil and criminal usury.

Collateral to this issue is the liability of the defendant Willis H. Yeamans on his personal guaranty of $100,000 of the Schoenthalers' indebtedness, more fully hereinafter discussed.

The plaintiff and defendants Schoenthalers agreed to submit the case to the Court as a non-jury trial on the basis of the pretrial stipulation and exhibits thereto, the pleadings, and depositions.

Defendants Schoenthalers, as owners, caused The Tahitian Cove Motel to be constructed in Naples, Florida, having obtained primary financing for this purpose from the Pension Fund which held a first mortgage on the premises. The Schoenthalers were overextended creditwise and needed secondary financing for their motel project so they could purchase furnishings and fixtures, satisfy a mortgage on the premises held by defendant Willis H. Yeamans (from whom the property was purchased) which was required to be done by the first mortgagee, and to provide them with cash to operate the motel.

The Maxwell Company became aware that it would be able to sell the furniture and fixtures to the Schoenthalers if The Maxwell Company also provided the necessary secondary financing required by the Schoenthalers. Accordingly, The Maxwell Company made arrangements for the secondary financing with the plaintiff, the terms and conditions of which were required to be approved and accepted by the plaintiff before the matter could be consummated.

On April 28, 1964, Maxwell and Schoenthalers entered into a commitment letter agreement pursuant to which Maxwell agreed to sell the Schoenthalers furniture, fixtures, carpets, and other sundry equipment selected by Schoenthalers for a cash price of $180,000 or a time price of $238,484.14, and to loan Schoenthalers $170,000 at 10 per cent simple interest; Schoenthalers were to execute two promissory notes to evidence the indebtedness; one note in the amount of $238,484.14 payable without interest prior to maturity and the other note in the amount of $170,000 bearing 10 per cent simple interest per annum from date.

It was provided that both notes were to be paid with a single monthly payment of $7,612.50 commencing Au-

gust 1, 1964, and paid continuously for 59 successive months thereafter. The monthly payment was to be first applied to the accrued interest on the $170,000 note and then toward the payment of the principal of the note for $238,484.14 and, when the latter note was fully paid, then to the payment of principal and interest on the $170,000 note. The commitment letter also required Schoenthalers to furnish a guaranty of defendant Willis H. Yeamans in the amount of $100,000 which was to be secured by placing this amount in escrow.

On May 26, 1964, the Schoenthalers executed and delivered to Maxwell the two promissory notes above described which are the subject matter of this suit. No payments have been made on either note. On the same date, May 26, 1964, the Schoenthalers and Yeamans executed a guaranty agreement by the terms of which they authorized and directed Maxwell to forward $100,000 as part of the loan of $170,000 directly to plaintiff as escrow holder. Yeamans disputes that either he or anyone on his behalf had authority to or did designate the plaintiff as escrow holder. It is without dispute, however, that this $100,000 was never withdrawn by plaintiff from its account and paid to anyone, but on the contrary it remained in plaintiff's general bank accounts, and there is no way of identifying this sum or even identifying the bank account where the funds are deposited. The plaintiff has treated the money as its own and has shown the $100,000 simply as a liability on its books. For this and other reasons, defendant Yeamans by counterclaim asserted a breach or material alteration of the guaranty agreement—an issue not required to be decided because of the disposition of the primary suit as hereinafter set forth.

Between June 1 and July 10, 1964, furniture of a total value of $212,887.82 was delivered by Maxwell to the

Schoenthalers. On July 10, 1964, $37,112.18 was paid to the Schoenthalers, making a total disbursement to them on or before July 10, 1964, of $250,000.

On June 9, 1964, Maxwell delivered its demand promissory note to plaintiff for $350,000 and indorsed the Schoenthalers' notes with recourse. Thereupon, plaintiff paid $25,000 to The Simmons Company on Maxwell's account; paid $211,664.43 to Maxwell; retained $13,335.57 in payment of an indebtedness owed to plaintiff by Maxwell, and retained $100,000 purportedly as escrow agent for Yeamans.

Plaintiff by its complaint filed herein elected to declare all sums due because of Schoenthalers' default and alleged that although it held a note for $238,484.14, it claimed $191,523.17 as the time-price differential on the sale of furniture having a cash price of $180,000 calculated from the date upon which the note was executed to the date suit was filed, October 8, 1964, with interest thereafter of $23,940.38.

Likewise, claim was made in the complaint on the other note for $170,000 principal with interest at 10 per cent from July 10, 1964, amounting to $22,988.88. The consideration claimed by plaintiff for the execution of this note by the Schoenthalers was the payment to them of $37,112.58; $100,000 held by plaintiff as escrow agent for Yeamans; a $5,000 "fee" for decorating and design services (claimed by Schoenthalers as a fee to Maxwell paid for obtaining the loan from plaintiff); and $27,887.82 for additional furniture not covered by the other note.

There is no dispute that the two notes of the Schoenthalers were executed and delivered simultaneously and were secured by the same mortgages. They were a part of one over-all transaction between the Schoenthalers and Maxwell; that is, Maxwell would not have loaned the money to the Schoenthalers without the latter's agreement to

purchase the furniture from Maxwell, and Schoenthaler would not have purchased the furniture from Maxwell without the latter's commitment to lend Schoenthalers the money.

It is also without dispute that prior to the time plaintiff advanced any funds in connection with the Schoenthaler transaction, it knew of the form of the notes and was informed of the contents of the agreements of April 28 and May 26, 1964.

Plaintiff acknowledges that the Schoenthalers are entitled to a credit of $3,827.13 for furniture returned to Maxwell.

Plaintiff's position simply stated is that there were two different parts to one transaction, i.e., (a) Maxwell sold furniture to the Schoenthalers for $180,000 cash or a time-price of $238,484.14 payable in 60 monthly installments, and (b) loaned $170,000 at 10 per cent simple interest repayable in 60 equal monthly installments, provided both would be guaranteed by Yeamans by his placing $100,000 in escrow. Thus, says the plaintiff, the note for $238,484.14 represents the sale of personal property and is not subject to the usury laws, and the note for $170,000 carries interest at 10 per cent per annum and is not usurious.

There is no doubt but that the usury laws of Florida apply only to a loan of money, or to the forbearance of a debt, and do not apply to the sale of property on credit. Mid-State Homes, Inc. v. Staines, Fla. App. 1964, 161 So.2d 569. But was this simply a sale and purchase transaction? It is well settled in Florida that the law will look to the substance of the transaction rather than to the form to determine usury, bearing in mind that usury on the part of the lender is largely a matter of intent. Kay v. Amendola, Fla. App. 1961, 129 So.2d 170.

A careful evaluation of the evidence as a whole leads to the inescapable conclusion that the two notes represent but one loan transaction.

The actual cash price for the furniture sold to the Schoenthalers was $212,887.22, and it is impossible to determine what furniture was sold and included in the $238,484.14 note and that which was included in the $170,000 note. The cash price of $180,000 was established in the $228,484.14 note and the balance of the cost of additional furniture of $27,884.82 was charged against the $170,000 note with a balance of $37,112.58 paid to the Schoenthalers.

There was thus actually but a single transaction involving a lump sum of money of $350,000 with a reservation of interest in one note of $58,484.14. The two notes are irrevocably tied together since, as previously pointed out, the sum of $7,612.50 is to be paid monthly on both notes and that amount is first to be credited on the interest accruing on the $170,000 note, with the balance being credited against the note for $238,484.14 until the latter was satisfied before there could be any reduction on the principal of the $170,000 note.

Further, plaintiff actually parted with only $250,000—not $350,000. The $100,000 that was to be paid to Yeamans never came into his hands, nor was it placed "in escrow", but was retained by the plaintiff in its general funds as security for the loan, plaintiff charging the Schoenthalers interest at the rate of 10 percent per annum and offering to pay Yeamans 4 per cent. This is a different situation, indeed, than had the plaintiff paid $100,000 to Yeamans and he had then deposited it with a stranger as escrow agent or had the plaintiff itself earmarked and segregated the funds. But it did neither and never did part with the funds. Under these circumstances, the retention by the plaintiff of the $100,000 in its general account and

used in its general business purposes brings the case within the ambit of Coral Gables First National Bank v. Constructors of Florida, Fla. App. 1960, 119 So.2d 741; Mindlin v. Davis, Fla. S.Ct. 1954, 74 So.2d 789, and Williamson v. Clark, Fla. App. 1960, 20 So.2d 637.

So it is that the plaintiff claims it is entitled to collect $170,000 as principal on one note plus $23,610 as interest thereon calculated at the rate of 10 per cent from July 10, 1964 (although the note is dated May 26, 1964). On the other note of $238,484.14 (executed the same date) the plaintiff claims $191,523.17 which it says represents the time-price differential on the sale of furniture at a cash price of $180,000 calculated from the date of the note until the date of suit, October 8, 1964, together with interest thereafter at the rate of 10 per cent to November 29, 1965, in the amount of $21,812.31.

Having determined, however, that these notes represented a single loan transaction, the plaintiff's attempt to disclaim forty-six odd thousand dollars as to the second note cannot affect the determination as to whether the notes are usurious. The plaintiff by its suit elected to accelerate maturity of the amounts due and is bound by the contract terms. As was said in Home Credit Company v. Brown, Fla. S.Ct. 1962, 148 So.2d 257:

"In any event, we think computations under the usury law must be based on a determination of the scope of acceleration rights which a note or contract purports to give a lender or holder and not upon the sums actually claimed by him. This follows necessarily from the principle that the vice of usury is one which inheres in the parties' agreement itself. When a note upon its face vests in the holder, as in the instant case and in Ayvas, supra, an option upon default to accelerate maturity of the total obligation, including unearned interest, then the results of its exercise must be evaluated under the literal contract

terms whether or not the complaint in fact seeks recovery of all such sums.

"We hold, in sum, that the presence of the acceleration option contingent on default did not alone warrant a finding of usury in the inception of the transaction here involved, and that in testing the results of its exercise the reserved interest must be calculated as payment for the use of the actual outstanding principal sum until the acceleration option became effective by entry of a decree * * *."

See also First Mortgage Corp. of Vero Beach v. Stellmon, Fla. App. 1964, 170 So.2d 302, cert. den. 174 So.2d 32, and Gordon v. West Florida Enterprises of Pensacola, Inc., Fla. App. 1965, 177 So.2d 859.

Interest calculations hereinafter made are from June 1, 1964 to December 1, 1965, even though the former predates the time in which the consideration for the loan was actually disbursed since the final sum was disbursed on July 10, 1964; and the closing date, December 1, 1965, is after the decision was announced in open Court (although the opinion and judgment necessarily were filed subsequently).

In accordance with the express tenor of the notes, the amount of interest that plaintiff is entitled to is as follows:

First Note

Prepaid interest	$58,484.14	
10% from 9/1/64 to 12/1/65	29,750.00	
	$88,234.14	$ 88,234.14

Second Note

10% from 6/1/64 to 12/1/65	$25,500.00	25,500.00
Total interest under both notes		$113,734.14

One further matter is in issue. Maxwell charged the Schoenthalers a "design and decorating fee" of $5,000. The evidence seems clear that this was nothing more than a further sham or contrivance to avoid the usury law. It is not possible to determine which of the two notes this "fee" was to be charged against, but it is of no moment for it was an exactment made in connection with the single loan transaction.

To the $113,734.14 of interest must be added the "design and decorating fee" of $5,000 which was charged (but upon which interest has not been calculated), thus making a total of $118,734.14 exacted.

These computations do not take into consideration $3,827.13 credit due Schoenthalers by Maxwell for returned furniture as stipulated by the parties, or interest thereon.

Interest at the rate of 25 per cent on $250,000 (the amount actually loaned) from June 1, 1964 to December 1, 1965 is $93,750. It is thus manifest that the loan by the plaintiff through Maxwell to the Schoenthalers violated the provisions of § 687.07[1] F.S.A. and the plaintiff therefore forfeits the entire amount, both principal and interest.

In sum, the notes at issue in this case were permeated with usury; the alleged time-price differential and discount were merely a disguise for usurious interest in the

1. Sec. 687.07 F.S.A. provides in pertinent part:

"Any person * * * lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, * * * shall forfeit the entire sum, both the principal and interest * * *."

one note coupled with the other; and plaintiff participated in the scheme to an extent sufficient to remove it from under the holder-in-due-course shield, irrespective of the non-negotiability of the tied-in notes.

Defendants Schoenthalers are entitled to a judgment in their favor and against plaintiff for the amount of the stipulated credit of $3,827.13 and costs to be taxed by the clerk.

In view of the foregoing, defendant Willis H. Yeamans is entitled to prevail on his counterclaim against the plaintiff and be discharged and released from his guaranty. This being dispositive of his claim, it is unnecessary to consider or decide whether the guaranty is a general or special one or whether there were material alterations or breaches of it as alleged by the counterclaimant. Defendant Yeamans, as counterclaimant, is entitled to the return of the sum of $100,000 from the plaintiff together with interest and costs.

Judgments in accordance with the foregoing to be settled and submitted within ten (10) days.

Dated at Miami, Florida, this 2nd day of December, 1965.

DAVID W. DYER,
Chief Judge.

APPENDIX B

Order Denying Motion for New Trial

Filed Dec. 23, 1965.

(Title Omitted.)

The Court has considered plaintiff's Motion for New Trial and the memoranda incorporated therein, together with the responses filed by the defendants Schoenthalers and Yeamans.

The Court's opinion in this case started with the well-developed case law premise that the usury laws of Florida do not apply to the sale of property on credit. But this proposition is inapposite to the finding made, supported by the evidence as a whole in this case, that the two notes represented but one loan transaction.

The additional arguments advanced by the plaintiff that there is a confusion in the decisions of the Florida Courts with respect to usury (which is not borne out by a careful study of them); and that the note might be prepaid without penalty thus making the note ambiguous (an issue never before raised and devoid of merit) are not persuasive.

The other points raised by the plaintiff were argued and submitted on several occasions prior to trial and again thereafter. They were carefully considered and are without merit.

One further comment is necessary. The plaintiff importunes the Court for a new trial so that evidence of custom and usage may be introduced to show the intent of the parties. Plaintiff would make this a landmark case because there is "* * * such a departure in the construction of usual and customary commercial transactions * * *."

and "There should be no disturbance of a generally accepted practice by the invocation of a particularly confused usury law of Florida * * *."

It would seem almost readily apparent that the facts in this case are so dissimilar to the types of contracts and financing agreements common in the trade of accounts receivable purchasing and factoring that it will stand as no precedent to disturb such bona fide transactions.

It is therefore, upon consideration,

Ordered and Adjudged that the plaintiff's Motion for New Trial be and the same hereby is denied.

Done and Ordered at Miami, Florida, this 22nd day of December, 1965.

DAVID W. DYER,
Chief Judge.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23457

AMERICAN ACCEPTANCE CORPORATION,
Appellant,
versus
EDWARD P. SCHOENTHALER and AGNES A. SCHOENTHALER, Husband and Wife, ET AL.,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

(January 29, 1968.)

Before PHILLIPS,* COLEMAN and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: This suit by plaintiff-appellant, American Acceptance Corporation (herein AAC), initially sought to foreclose a real and chattel mortgage held by it as assignee of The Maxwell Company (the original mortgagee) on certain property, against Edward P. and Agnes A. Schoenthaler (herein Schoenthaler or the Schoenthalers) as mortgagors and divers defendants who claimed an interest or lien upon the property in question. The latter mortgages and claims were inferior to a first mortgage held by Central States, Southeast and Southwest Areas Pension Fund (herein Union Pension Fund), and plaintiff's second mortgage liens on the property which secured the notes in question, as well as the claims of the

*Of the Tenth Circuit, sitting by designation.

other defendants. They were extinguished during the course of these proceedings by the foreclosure of the first mortgage in a state court. Thus, the only issue remaining as between the plaintiff and defendants Schoenthalers is as to the amount owing, if any, on the two promissory notes formerly secured by the mortgages—the Schoenthalers asserting their invalidity because of civil and criminal usury.

Collateral to this issue is the liability of the defendant Willis H. Yeamans on his personal guaranty of $100,000 of the Schoenthalers' indebtedness. The plaintiff and defendants Schoenthalers agreed to submit the case to the Court sitting without a jury on the basis of the pretrial stipulation and exhibits thereto, the pleadings, and depositions.

Defendant Yeamans alleged in his Counterclaim against AAC that AAC was holding $100,000 to secure defendant Yeamans' guaranty of a portion of the mortgage indebtedness. He further alleged that there had been material breaches of the guaranty agreement, resulting in its termination and, in addition, that AAC was guilty of criminal usury, as defined in Section 687.07, Florida Statutes 1965, terminating defendant's guaranty. The parties *stipulated* that the $100,000 held by AAC was the property of Dr. Yeamans.

This case involves construction and application of the Florida usury statutes.[1] We hold that the trial court cor-

1. 687.03. Unlawful rates of interest defined; proviso.—It shall be usury and unlawful for any person, or for any agent, officer or other representative of any person, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, except upon an obligation of a corporation, a rate of interest greater than ten per cent per annum, either directly or indirectly, by way of commission for advances, discounts, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten per cent; and such transactions with a corporation shall, whereby the corporation pays interest, be usury and unlawful if for a rate of interest

rectly construed and applied these statutes as requiring a forfeiture of both principal and interest, and accordingly affirm.

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greater than fifteen per cent per annum. The provisions of this section shall not apply to sales of bonds in excess of one hundred dollars and mortgages securing the same, or money loaned on bonds.

History.—§2, ch. 4022, 1891; GS 3105; §2, ch. 5960, 1909; RGS 4851; CGL 6938; §2, ch. 29705, 1955.

cf.—§1.01(3), "Person" defined.

687.04. Penalty for usury, not to apply to transferee of negotiable paper unless usury appears on face.—Any person, or any agent, officer or other representative of any person, willfully violating the provisions of §687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person, who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted; provided, however, that this shall not apply to a bona fide endorsee or transferee of negotiable paper purchased before maturity, unless the usurious character should appear upon its face, or that the said endorsee or transferee shall have had actual notice of the same before the purchase of such paper, but in such event double the amount of such usurious interest may be recovered after payment, by action against the party originally exacting the same, in any court of competent jurisdiction in this state, together with an attorney's fee, as provided in §687.06.

History.—§3, ch. 4022, 1891; GS 3106; §3, ch. 5960, 1909; RGS 4852; CGL 6939.

687.07. Forfeiture and penalty in case of excessive interest or charges.—Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees or otherwise, or for forbearing to enforce the collection of such moneys or otherwise, shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than one hundred dollars, or be imprisoned in the county jail not more than ninety days.

History.—§5, ch. 5960, 1909; RGS 4855, 5689; CGL 6942, 7903.

cf.—§775.06 Alternative punishment.

The basic facts are undisputed. Defendants Schoenthalers, as owners, caused The Tahitian Cove Motel to be constructed in Naples, Florida, having obtained primary financing for this purpose from the Union Pension Fund. The Union Pension Fund thereupon received a first mortgage on the premises. The Schoenthalers were overextended creditwise. They needed secondary financing for their motel project to purchase furnishings and fixtures, and to satisfy a mortgage on the premises held by defendant Willis H. Yeamans (from whom the property was purchased). Satisfaction of the Yeamans mortgage was a requirement of the first mortgage. Also necessary for the launching of the venture was cash for operating expenses.

On April 28, 1964, Maxwell and the Schoenthalers entered into a commitment letter agreement pursuant to which Maxwell agreed to sell the Schoenthalers furniture, fixtures, carpets, and other sundry equipment selected by Schoenthalers for a cash price of $180,000 or a time price of $238,484.14, and to lend Schoenthalers $170,000 at 10 per cent simple interest. The Schoenthalers were to execute two promissory notes to evidence the indebtedness: one note in the amount of $238,484.14 payable without interest prior to maturity, and the other note in the amount of $170,000 bearing 10 per cent simple interest per annum from date.

It was provided that both notes were to be paid with a single monthly payment of $7,612.50 commencing August 1, 1964, and paid continuously for 59 successive months thereafter. The monthly payment was to be first applied to the accrued interest on the $170,000 note and then toward the payment of the principal of the note for $238,484.14 and, when the latter note was fully paid, then to the payment of principal and interest on the $170,000 note. The com-

mitment letter also required the Schoenthalers to furnish a guaranty from defendant Willis H. Yeamans in the amount of $100,000 guaranteeing their obligation to that extent. $100,000 was to be placed in escrow to guarantee this obligation.

On May 26, 1964, the Schoenthalers executed and delivered to Maxwell the two promissory notes above described. These notes are the subject matter of this suit. No payments have been made on either note. On the same date, May 26, 1964, Schoenthaler executed a guaranty agreement by the terms of which he authorized and directed Maxwell to forward $100,000 as part of the loan of $170,000 directly to AAC as escrow holder. Yeamans disputes that either he or anyone on his behalf had authority to or did in fact designate the AAC as escrow holder. It is without dispute, however, that this $100,000 was never withdrawn by AAC from its account and paid to anyone and was not in any way segregated, but to the contrary remained in AAC's general bank accounts. From AAC's books there is no way of identifying this sum or even identifying the bank account where the funds are deposited. AAC has treated the money as its own and has shown the $100,000 simply as a liability on its books. For this and other reasons, defendant Yeamans by counterclaim asserted a breach or material alteration of the guaranty agreement.

Between June 1 and July 10, 1964, furniture of a total value of $212,887.82 was delivered by Maxwell to the Schoenthalers. On July 10, 1964, AAC paid $37,112.18 to the Schoenthalers, making a total disbursement to them on or before July 10, 1964, of $250,000.

On June 9, 1964, Maxwell delivered its demand promissory note to AAC for $350,000 and indorsed the Schoen-

thalers' notes with recourse. Thereupon, AAC paid $25,000 to The Simmons Company on Maxwell's account; paid $211,664.43 to Maxwell; retained $13,335.57 in payment of an indebtedness owed to AAC by Maxwell, and retained $100,000 purportedly as escrow agent for Yeamans.

AAC by its complaint filed herein elected to declare all sums due because of Schoenthalers' default and alleged that although it held a note for $238,484.14, it claimed $191,523.17 as the time-price differential on the sale of furniture having a cash price of $180,000 calculated from the date on which the note was executed to the date suit was filed, October 8, 1964, with interest thereafter at the rate of 10 per cent in the amount of $21,812.31 to November 29, 1965.

Likewise, claim was made on the $170,000 note for the principal amount of $170,000 plus interest at 10 per cent from July 10, 1964 (although the note is dated May 26, 1964) amounting to $23,610.

The consideration claimed by AAC for the execution of the $170,000 note by the Schoenthalers was the payment to them of $37,112.58; $100,000 held by AAC as escrow agent for Yeamans; a $5,000 "fee" for decorating and design services (claimed by the Schoenthalers and treated by the trial judge as a fee paid to Maxwell for obtaining the loan from AAC); and $27,887.82 for additional furniture not covered by the $238,484.14 note.

There is no dispute that the two notes of the Schoenthalers were executed and delivered simultaneously and were secured by the same mortgages. They were a part of one over-all transaction between the Schoenthalers and Maxwell; that is, Maxwell would not have loaned the money to the Schoenthalers without the latter's agree-

ment to purchase the furniture from Maxwell, and Schoenthaler would not have purchased the furniture from Maxwell without the latter's commitment to lend Schoenthaler the money.

It is also without dispute that prior to the time AAC advanced any funds in connection with the Schoenthaler transaction, it knew of the form of the notes and was informed of the contents of the agreements of April 28 and May 26, 1964.

I.

AAC's primary position, as stated by the District Judge, and as maintained on this appeal, is that there are two separate parts to the transaction: (a) Maxwell sold furniture to the Schoenthalers for $180,000 cash or a time-price of $238,484.14 payable in 60 monthly installments, and (b) loaned $170,000 at 10 per cent simple interest repayable in 60 equal monthly installments, provided both would be guaranteed by Yeamans by his placing $100,000 in escrow. Thus, says AAC, the note for $238,484.14 represents the sale of personal property and is not subject to the usury laws, and the note for $170,000 carries interest at 10 per cent per annum and is not usurious.

Contrary to AAC's contentions, the District Judge found that the evidence "as a whole leads to the inescapable conclusion that the two notes represent but one loan transaction". The reasoning of the lower court was that Florida law requires examination of the substance of the transaction rather than the mere form to determine usury. *Kay* v. *Amendola,* 129 So.2d 170 (2d D.C.A. Fla. 1961). AAC attacks *Amendola* as weak authority for the proposition for which it was cited by the District Court. AAC concludes that this case is "without any supporting authority for the construction placed upon it by the learned District

Judge". Assuming without conceding the weakness of *Amendola*, there is other ample Florida authority to support the proposition for which it is cited. Time and again the Florida courts have looked to the substance of a transaction to determine if it was a loan rather than a purported sale. *Griffin* v. *Kelly*, 92 So.2d 515 (Fla. 1957); *Brown* v. *Home Credit Co.*, 137 So.2d 887 (2nd D.C.A. 1962), Aff'd 148 So.2d 257 (Fla. 1963); *Gordon* v. *West Florida Enterprises of Pensacola, Inc.*, 177 So.2d 859 (1st D.C.A. 1965). The same approach has been taken by this Court in *Connor Air Lines, Inc.* v. *Aviation Credit Corporation*, 5 Cir. 1960, 280 F.2d 895, cert. den. 364 U.S. 911, 81 S.Ct. 274, 5 L.Ed.2d 225.

In *Griffin* v. *Kelley, supra*, the transaction had been disguised as the apparent sale of stock, but the court looked through such a scheme and quoted with approval the following language of the Restatement of Contracts, Section 529:

> "Where the intent of a party to a bargain is to make a loan of money or an extension of the maturity of the pecuniary debt for a greater profit than is allowed by law, the agreement is illegal although the transaction is put, in whole or in part, in the form of a sale, a contract to sell or other contract."

The language of *Home Credit* on its appearance in the Florida appellate court is strong support for the same proposition. The following quotations are illustrative:

> "In the instant case the lower court in effect found that *Alderman* and *Home Credit*, acting in concert, intended to disguise a usurious loan as a sale of a home improvement. We are not persuaded to disturb that finding."
>
> 137 So.2d at 891.

. . .

> "The lower court in its decree ruled that the burden of proving fraud had not been met by the Defendant, but that the notes and mortgage held by *Home Credit* were drawn in an attempt to circumvent the usury statutes, for the reason that *Home Credit* in effect dictated and created the terms of the loan obligation to the original parties, with full knowledge that, if the loan had been handled as a normal loan, the amount of interest derived would, in fact, have been usurious . . ."
>
> 137 So.2d at 890.

On certiorari granted by the Florida Supreme Court in *Home Credit* the Florida position of looking to the substance of the transaction was further emphasized at 148 So.2d 258:

> "Our examination of the record and facts recited in the opinion of the District Court fully sustains its conclusions with respect to the Petitioner's position and participation in the transaction from the outset rather than as a third party holder in due course, and we conclude also that the nature of the transaction between the parties was properly defined as a loan obligation subject to the usury statutes."

After its critical analysis of *Amendola*, AAC implies that there is no other Florida authority allowing a court to pierce the form of a transaction to examine its substance. The preceding authorities amply dispose of such an implication.

The next question, and a most critical one, is whether the record does in fact support a finding that the entire transaction was one loan rather than two, separate, lawful transactions. After a thorough examination of the record, we conclude that it does for the reasons enumerated below. Beginning with the stipulation entered into by the parties:

"(3) Pursuant to the terms of the Commitment Letter, Schoenthaler executed and delivered to The Maxwell Company the two notes which form the basis of this law suit. These two notes were executed and delivered simultaneously and were secured by the same mortgages. They are a part of one over-all transaction between Schoenthaler and The Maxwell Company; that is, The Maxwell Company would not have lent the money to Schoenthaler without Schoenthaler's agreement to buy the furniture from The Maxwell Company and Schoenthaler would not have purchased the furniture from The Maxwell Company without the Maxwell Company's commitment to lend him the money."

AAC, as assignee of the notes from Maxwell, now seeks to separate the two transactions in order to save them from the vice of usury. AAC begins its argument with numerous citations indicating that the usury laws do not apply to the sale of personal property. The District Judge recognized, and it has never been argued otherwise than that the usury laws do not apply to such a sale. *Mid-State Homes, Inc.* v. *Staines,* 161 So.2d 569 (2d D.C.A. Fla. 1964); *Davidson, et al.* v. *Davis,* 52 So. 139 (Fla. 1910). The critical issue is not whether the usury laws apply to the sale of personal property, but whether the instant case actually was a sale rather than a loan. *Davidson* v. *Davis, supra,* makes it clear that the intent of the parties is determinative as to whether a transaction is a loan rather than a sale. The intent of AAC and Maxwell is revealed at numerous points in the record in addition to the stipulation previously quoted.

The initial distinction made by the parties is that AAC views the purchase of the furniture as the primary phase of the transaction and of utmost importance to Schoenthaler. On the other hand, Schoenthaler emphasizes that

it was the financing and working capital that he was interested in and whoever could provide these would obtain the furniture contract.

To determine the loan versus sale question we first look to the testimony of Mr. John M. Lowe, Vice President of Maxwell. When asked to explain his understanding of this entire transaction, he replied:

> "A. Well, Mr. Schoenthaler had a motel to furnish and he needed some financing to buy the furniture, to pay off some obligations or whatnot, he needed money, and we agreed to arrange a mortgage for him, to finance the furniture that he wanted to buy and to give him some extra capital by giving us a mortgage as security for the debt. We arranged this with a finance company, and that is the story. We sold him the furniture and gave him the money.
>
> Q. Who was the finance company?
>
> A. American Acceptance Corporation.
>
> Q. You say you arranged it with the finance company. What do you mean by that?
>
> A. We arranged that they would handle the paper for us, be back of us. We arranged to give him the mortgage—I mean that would have no bearing on it.
>
> Q. You mean you set up the financing?
>
> A. Oh, yes. We set it up for it. They weren't concerned with American Acceptance or anybody else. We set up the financing.
>
> Q. How much was involved?
>
> A. $350,000."

When asked how Maxwell arrived at the $170,000 figure for the loan, Mr. Lowe stated: "We didn't pick the figure. He [Schoenthaler] said he needed $350,000; $180,000 to buy the furniture with and $170,000 worth of financing."

The Maxwell Company became aware that it would be able to sell the furniture and fixtures to the Schoenthalers if the Maxwell Company also provided the necessary secondary financing required by the Schoenthalers. Accordingly, the Maxwell Campany made arrangements for the secondary financing with AAC, the terms and conditions of which were required to be approved and accepted by AAC before the matter could be consummated.

Defendant Schoenthaler testified that the original plans called for a loan from Union Pension Fund for $1,750,000 in return for a first mortgage. Subsequently, the Union had a change of mind and would only agree to a loan of $1,350,000. This reduction in the loan from the Union necessitated the search for secondary financing in the amount of $500,000, initially. With the circumstances thus, Schoenthaler was then contacted by Mr. Allan Greenfield, representing Maxwell, who told Schoenthaler, "I think our home office in Miami might be able to help you, and I will get in touch with them". At this time Schoenthaler had never heard of the Maxwell Company. Within a week Mr. Irving Greenfield, President of Maxwell Company, called Schoenthaler seeking additional information about the type hotel that was planned to be built. He also stated that he had people in mind to provide the secondary financing. Thereafter, Mr. Greenfield told Schoenthaler that $350,000 was the best financing he had been able to arrange.

Schoenthaler further explained that the proceeds of the $350,000 were to be applied $180,000 for furniture, $119,-500 to pay off the Yeamans mortgage and $50,000 operating capital. Schoenthaler also added that "at this stage we were fairly desperate" and he had no alternative but to accept the proposal of Maxwell.

George E. Carroll, defendant Schoenthaler's attorney, testified that Schoenthaler had sought secondary financing from hundreds of others before being contacted by Maxwell. In response to the question of whether the transaction with Maxwell was one deal or two separate transactions, Carroll answered:

> "A. Well, the terms of the letter speak for itself. We negotiated one deal. That's how it came out.
>
> Q. The purchase of the furniture was to depend on making the loan of cash in addition to that, was it not?
>
> A. Well, look at it this way. We only had furniture on credit.
>
> Q. You wouldn't have bought the furniture unless he loaned the money?
>
> A. We wouldn't buy the furniture unless they loaned us some money. So that's basically how the loan came up. If we didn't get the money, we wouldn't have been there."

To further show the loan characteristics of the entire transaction, the District Court made the following observations in its findings of fact:

> "The actual cash price for the furniture sold to the Schoenthalers was $212,887.22, and it is impossible to determine what furniture was sold and included in the $238,484.14 note and that which was included in the $170,000 note. The cash price of $180,000 was established in the $228,484.14 [$238,484.14] note and the balance of the cost of additional furniture of $27,884.82 was charged against the $170,000 note with a balance of $37,112.58 paid to the Schoenthalers.
>
> "There was thus actually but a single transaction involving a lump sum of money of $350,000 with a reservation of interest in one note of $58,484.14. The two notes are irrevocably tied together since, as pre-

viously pointed out, the sum of $7,612.50 is to be paid monthly on both notes and that amount is first to be credited on the interest accruing on the $170,000 note, with the balance being credited against the note for $238,484.14 until the latter was satisfied before there could be any reduction on the principal of the $170,-000 note." (R. 1086)

Our study of the record discloses no inaccuracy in the above findings, and we concur in the conclusion reached by the District Court that the two notes represent but one loan transaction.

II.

Two contentions raised by appellants will be discussed under this section: (1) whether the loan was actually funded for the full $350,000, or for only $250,000, and (2) whether there was sufficient proof of the intent to exact usury, as required by the Florida Statutes.

AAC required a guaranty from Dr. Yeamans of $100,000 and the guaranty of Congress International Inns, Inc., under which name the motel was to be operated, in the amount of $150,000 before it would provide the financing sought by Schoenthaler. From the $170,000 loan to the Schoenthalers, $119,500 was to be paid to Dr. Yeamans who, in turn, was to place $100,000 in escrow as his guaranty of the Schoenthaler obligation. The terms of the Guaranty Escrow Agreement pertaining to the above arrangement read as follows:

"To secure the guaranty of the said Dr. Willis H. Yeamans, there is to be deposited in a bank to be selected by yourselves and the undersigned the sum of $100,000, same to be held in escrow by said bank for security for the performance by the said Dr. Willis H. Yeamans of the terms of said guaranty."

What actually happened was that it was subsequently decided by AAC that it would just hold the $100,000, and, in fact, it never parted with that amount. The following facts are clear in the record: (1) Yeamans never had the $100,000, and (2) AAC never obtained Yeamans' permission for it to hold the $100,000 rather than to deposit the $100,000 in a bank at the direction of Yeamans as provided in the Guaranty Escrow Agreement.

There are repeated references in the Guaranty Escrow Agreement to the effect that a "bank" was to hold the $100,000. AAC is a finance company. Under even the loosest of language, it is not a bank.

The position of AAC is that it had no interest in who held the $100,000, and that it ended up holding the $100,000, by agreement of the parties. AAC argues that its holding the $100,000 is no different from its paying the $100,000 directly to Yeamans, with, in turn, a redeposit of the money with AAC as escrow agent. The obvious answer is that if the money had been paid to Yeamans as called for in the stipulation, Yeamans would have made the deposit in a bank and not with AAC. Yeamans never consented to any alteration of the Guaranty Escrow Agreement. It was only *after* the closing of transaction that Yeamans was informed that AAC was to hold the money. The only consent AAC ever obtained to hold the money was from Mr. Carroll, attorney for Schoenthaler. The transaction was closed over the objection of Yeamans.

Yeamans also observes that the $100,000 retained by AAC was never set aside into any type of escrow account. Mr. Alkins, Comptroller of AAC, testified that the $100,000 remained in the general funds of AAC and was noted on the books as a liability to Maxwell.

We conclude that the loan was funded only in the amount of $250,000, rather than $350,000. Therefore, the interest rate computations of the District Court were properly made with reference to $250,000, the amount actually disbursed. The rule is abundantly clear under the Florida decisions that interest may not be charged on portions of the principal not disbursed or retained (either or both) as security for the loan. *Mindlin* v. *Davis,* 74 So.2d 789 (Fla. 1954); *Williamson* v. *Clark,* 120 So.2d 637 (2nd D.C.A. 1960); *Coral Gables National Bank* v. *Constructors of Florida,* 119 So.2d 741 (3rd D.C.A. 1960). The $100,000 in question clearly was retained by AAC. It was not retained at the direction of Yeamans, nor was it deposited in escrow as called for by the Guaranty Escrow Agreement.

AAC also argues that there is insufficient evidence to support the requirement of the Florida Statutes that the excessive interest be "willfully and knowingly" charged by the lender.[2]

The proof of willfulness necessarily involves determination of the subjective state of the mind of the lender. *Travers* v. *Tilton,* 134 So.2d 807 (2d D.C.A. Fla. 1961). The Florida Supreme Court observed in *Shorr* v. *Skafte,* 90 So.2d 604, 607 (Fla. 1956), that "a man's actions are indicia of his intentions". Continuing further, the Court added:

> "The ignorance of the borrower is of small consequence; the important factor is the willfulness of the lender. *And the matter of willfulness is not absolutely closed by the bare statement of the lender that he was unconscious of wrongdoing.* If such were the law the prohibition would amount to nothing. The circumstances must be taken into account . . ." (Emphasis added)

Other Florida decisions have emphasized the necessity of clearly showing the intent to evade the usury laws. *Indian Lake Estates, Inc.* v. *Special Invs., Inc.*, 154 So.2d 883 (2d D.C.A. Fla. 1963). Such cases are, of course, relied on by AAC, but a closer examination of them reveals that the only evidence of intent to charge usurious rates "has been the intent to exercise the option to accelerate upon default",[3] as was done in the instant case.

We conclude there is sufficient evidence in the present record to support a finding of "willfully and knowingly" charging the excessive interest. In addition, AAC stipulated as a fact the following:

> "American Acceptance Corporation, however, concedes that if the $238,484.14 mortgage note came into existence by reason of a 'loan' transaction rather a 'purchase and sale' transaction, the provisions of the Florida Statutes relating to usury have been violated by The Maxwell Company."

The foregoing stipulation and Florida decisions foreclose AAC's contention that "intent" is not shown by the proof.

III.

The next contention of AAC is that Florida Statute 687.07 could not apply to the present facts. At the outset we note that no payments were ever made on the obligation in question. AAC employs a comparison of Florida Statutes 687.03, 687.04 and 687.07 to reach the conclusion that 687.07 could not apply to the present situ-

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3. Hardaway, *Debtor-Creditor Conflict Over Acceleration*, 17 U. Fla. L. Rev. 163, 186 (1964); See also, 11 U. Fla. L. Rev. 384 (1958), where it is noted that the Florida cases do not require an intent to violate the statute, but only an intent to charge the rate provided in the transaction. To the same effect is Boyer, *Usury and the Viruliferous Acceleration Clause in Florida*, 21 U. Miami L. Rev. 215, 231 (1966).

ation. An analysis of the preceding provisions reveals that 687.03 contains the general definition of civil usury, i.e., "to reserve, charge or take for any loan . . . a rate of interest greater than ten per cent per annum". It is necessary to look to 687.04 for the penalty provisions of 687.03. Section 687.04 provides for a forfeiture of "the entire interest so charged, or contracted to be charged or reserved", but allows collection of the principal sum if the interest exceeds 10 per cent per annum. However, if the "usurious interest is taken or reserved, or has been paid", 687.04 orders a forfeiture of double the amount so paid. Thus, in civil usury cases, the Florida legislature has distinguished between merely charging or contracting to charge or reserve interest on the one hand, and the actual taking, reservation or paying of the interest on the other. The penalty for the latter is *double* forfeiture of the interest.

Proceeding to 687.07, we observe that the prohibited rate of interest is that in excess of 25 per cent per annum, and the fact that violation of this section is defined as a misdemeanor has led to the common reference to 687.07 as the "criminal usury" statute. Section 687.07 contains both the prohibitions and the penalties, unlike the dichotomy of 687.03 and 687.04, the civil usury statutes. The activity prohibited in 687.07 is to "charge or accept" interest exceeding 25 per cent per annum. The penalties provided are the forfeiture of principal and interest plus the misdemeanor violation previously mentioned.

ACC insists that there is a meaningful distinction to be found in the legislature's use of "charged, or contracted to be charged" in 687.04, and the phrase "charge or accept" in 687.07. The conclusion of AAC is "that in Chapter 687.07 the only construction consistent with the

legislative intent has to be that "charged, as expressed in Chapter 687.04, means that the person lending the money actually did receive it through payment". Apparently, such a conclusion is based on the reasoning that "charge" in 687.07 means that payment is actually made by virtue of the fact that "charge" was not used in conjunction with "contracted to be charged" as it was in 687.04.

Such a conclusion is strained to say the least. Section 687.04 makes a distinction between instances where the interest is "charged, or contracted to be charged", in which case the interest is forfeited, and those instances in which the interest "is taken or reserved, or has been paid", in which case the forfeiture is double. Thus, it is apparent that different penalties were provided for the two different situations in 687.04.

No such distinction was made in 687.07. We conclude that the only reasonable interpretation of 687.07 is that both the interest and principal are to be forfeited if the interest exceeds 25 per cent per annum, without regard to the actual collection of the interest.[4] Clearly, the ordinary meaning of "charge" is not sufficiently broad to contemplate the requirement of actual payment.

The Florida Courts have had numerous opportunities to construe this point in the usury statutes. In *Brown* v. *Home Credit Co.*, 148 So.2d 257 (Fla. 1963), the Florida Supreme Court found criminal usury in a situation in which the borrower signed notes in the face amount of $8,750.00. The amount advanced to the borrower was only $5,000.00. Default occurred after only one payment

4. Webster's New International Dictionary defines charge as: "To make a charge; to demand or set a price; to make a debit; as, to *charge* high for goods."

had been made, and yet the Court ordered forfeiture of principal and interest despite the fact that the one payment made represented only 1/120 of the total obligation.

First Mortgage Corp. of Vero Beach v. *Stellmon*, 170 So.2d 302 (2d D.C.A. Fla. 1964), cert. den. 174 So.2d 32 (Fla. 1965), involved the double forfeiture portion of 687.04 which requires that the interest be "taken or reserved or has been paid". The facts were that the borrower signed a note for $20,320, with $12,840.60 being advanced by the lender. Had the note run to maturity, the interest would have been less than 10 per cent per annum. However, the note contained an acceleration clause, and on default of a few installments suit was brought by the lender for the total amount. The interest was then computed for the period of time from the inception of the contract to the date of the final decree. This computation revealed an interest rate in excess of 10 per cent and the Court ordered double forfeiture. The Court also noted that the loan was criminally usurious but the application of the double forfeiture provision of 687.04 had extinguished both principal and interest and made application of 687.07 unnecessary.

The net effect of *Home Credit* and *First Mortgage* is to hold that the addition of principal and interest in the note is enough of a "taking" or "charging" to warrant application of either the double forfeiture provision of 687.04 if the interest exceeds 10 per cent, or the forfeiture of both principal and interest under 687.07 if the interest exceeds 25 per cent.[5]

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5. Accord: *Gordon* v. *West Florida Enterprises of Pensacola, Inc.*, 177 So.2d 859 (1st D.C.A. Fla. 1965); Boyer, *Usury and the Viruliferous Acceleration Clause in Florida*, 21 U. Miami L. Rev. 235-237 (1966).

The District Court was correct in its application of 687.07 to the present situation, and in ordering that AAC forfeit both principal and interest.

IV.

AAC makes the further contention that it is a bona fide transferee of the notes, and that under these circumstances the defense of usury is not applicable to it. To this the appellees have three answers: (1) AAC participated in the entire transaction to such an extent that it would not be considered a bona fide purchaser without notice or a holder in due course; (2) each note is burdened with the terms and conditions of the other, thus making them non-negotiable; and (3) the statute applicable to this action is Florida Statutes 687.07, the criminal usury statute, rather than the civil usury statute, Florida Statutes 687.04, relied on by AAC in its asserted defense. The protective clause of being a "bona fide endorsee or transferee of negotiable paper", appearing in Florida Statutes 687.04 does not appear in 687.07; therefore, the conclusion urged by the appellees is that the Florida legislature did not intend for such a defense to be interposed in a situation involving application of 687.07, the so-called "criminal usury" statute.

We deal first with the contention of appellees that AAC participated in the entire transaction, noting their argument that AAC participated in and dominated the terms and conditions of the transaction in much the same way as was done in *Brown* v. *Home Credit*, 137 So.2d 887 (2d D.C.A. Fla. 1962) aff'd. 148 So.2d 257 (Fla. 1962). The

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We are mindful of our decision in *Connor Air Lines, Inc.* v. *Aviation Credit Corporation*, 5 Cir. 1960, 280 F.2d 895, cert. den. 364 U.S. 911, wherein the opposite construction was placed on the Florida usury statutes. However, the more recent Florida decisions just discussed place a different interpretation on these statutes. *Erie* requires us to follow the Florida decisions.

present record contains ample evidence supporting such a contention. Indeed, the record is not susceptible of any other construction.

Mr. Aaron Kanner was the attorney who represented Maxwell in the Schoenthaler transaction. Mr. Kanner first learned of the proposed deal while in Chicago with Mr. Greenfield, President of Maxwell, in March of 1964. It was discussed and understood at that time that Schoenthaler needed some financing, and that whoever could get the financing for him would also get the furniture contract. Mr. Kanner also testified that it was generally known that Schoenthaler's attempts to get such a loan had been turned down everywhere. AAC then entered the picture as the source of the additional financing and from that time forward the terms and conditions of the commitment letter of April 28, 1964, were programmed around the desires of AAC. Mr. Kanner stated in his deposition that AAC "wasn't too happy" with the idea of Congress International executing a guaranty of only $100,000, and thereafter Congress agreed to go to $150,000. Mr. Kanner further testified that "all the previous conferences in relation to the commitment were predicated on the basis that we [Maxwell] would find somebody to take the paper from us; that if we didn't find somebody to take the paper from us, there would be no deal. They understood that".

When asked specifically whether the commitment letter was drafted to satisfy AAC, Mr. Kanner replied: "That is it exactly".

If additional evidence is needed showing AAC's participation, it can be found in the pretrial stipulation:

> "(7) American Acceptance Corporation admits that prior to the time it advanced any funds in con-

nection with the Schoenthaler transaction, it knew of the form of the notes and was also informed with respect to the contents of the April 28, 1964 Commitment Letter and the Guaranty Escrow Agreement dated May 26, 1964."

As early as March of 1964, Mr. Greenfield told defendant Schoenthaler that AAC was to be the source of additional finances.

For AAC now to argue that it is a "bona fide endorsee or transferee" of the notes in question pursuant to Florida Statutes 687.07 is directly contra to its admitted awareness of the transaction as evidenced by the stipulation. The other evidence, particularly the testimony of Mr. Kanner, amply supports a finding that AAC was not a bona fide transferee, but negotiated with Maxwell from the outset concerning the secondary financing.

We therefore conclude that the record is entirely inconsistent with the argument of AAC. It is impermissible for AAC to have participated in this transaction to such extent that the actual terms were established by AAC, and at the same time acquire for itself the status of "bona fide endorsee or transferee". Our holding on this point adequately disposes of AAC's defense and makes unnecessary a resolution of the remaining contentions of Schoenthaler: whether the notes were in fact negotiable and also whether the defense of bona fide endorsee or transferee is available in an action for criminal usury.

V.

We have now concluded that the loan was funded for only $250,000 and that the interest computations were correctly made with reference to that amount. AAC now injects the additional contention that it is logically inconsistent to hold on the one hand that $100,000 was never

advanced and then order that judgment be entered for Dr. Yeamans for the same $100,000. The gist of the argument is that the $100,000 never became the property of Dr. Yeamans and cannot now be recovered by him. Pertinent to this contention is the stipulation of the parties reading: "It is stipulated and agreed that the sum of $100,000 being held by American Acceptance Corporation is the property of Dr. Yeamans."

The fact that a loan has been funded for $250,000 ($100,000 less than the amount contracted for) is determinative of the sum on which interest may legally be charged, but such fact is not dispositive of the ultimate recipient of the principal if the principal is to be forfeited by virtue of the usurious nature of the entire transaction.

We note that the counterclaim of Dr. Yeamans seeks the $100,000 by virtue of an alleged material alteration of the guaranty agreement, i.e., the $100,000 was never deposited with a bank as escrow agent as provided in the guaranty agreement. However, after deciding that the principal and interest were to be forfeited, the District Court concluded:

> ". . . [I]t is unnecessary to consider or decide whether the guaranty is a general or special one or whether there were material alterations or breaches of it as alleged by the counterclaimant. Defendant Yeamans, as counterclaimant, is entitled to the return of the sum of $100,000 from the plaintiff together with interest and costs."

It was obviously the conclusion of the District Court that the $100,000 was part of the principal amount of the loan, although the loan was never funded with that amount so as to make interest computations allowable

thereon. The fact that the loan was never funded with the $100,000 does not mean that that amount would not be forfeitable under 687.07. The $100,000 had to be either principal or interest. Whichever it was, it is forfeitable if the entire transaction is found to be criminally usurious.

We have examined and considered all other points raised by AAC and find them to be without merit. The judgment of the District Court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23457

D. C. Docket No. 64-609-CIV-DD
AMERICAN ACCEPTANCE CORPORATION,
Appellant,

versus

EDWARD P. SCHOENTHALER and AGNES A. SCHOENTHALER, Husband and Wife, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before PHILLIPS*, COLEMAN and SIMPSON, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, American Acceptance Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate:

January 29, 1968

*Of the Tenth Circuit, sitting by designation.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23457

AMERICAN ACCEPTANCE CORPORATION,
Appellant,
versus
EDWARD P. SCHOENTHALER and AGNES A. SCHOENTHALER, Husband and Wife, ET AL.,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

On Petition for Rehearing En Banc

(March 27, 1968)

Before PHILLIPS*, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

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*Of the Tenth Circuit, sitting by designation.

APPENDIX E

687.03 Unlawful rates of interest defined; proviso.—It shall be usury and unlawful for any person, or for any agent, officer or other representative of any person, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, except upon an obligation of a corporation, a rate of interest greater than ten per cent per annum, either directly or indirectly, by way of commission for advances, discounts, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten per cent; and such transactions with a corporation shall, whereby the corporation pays interest, be usury and unlawful if for a rate of interest greater than fifteen per cent per annum. The provisions of this section shall not apply to sales of bonds in excess of one hundred dollars and mortgages securing the same, or money loaned on bonds.

HISTORY.—§2, ch. 4022, 1891; GS 3105; §2, ch. 5960, 1909; RGS 4851; CGL 6938; §2, ch. 29705, 1955.

cf.—§1.01(3), "Person" defined.

687.04 Penalty for usury; not to apply to transferee of negotiable paper unless usury appears on face.—Any person, or any agent, officer or other representative of any person, willfully violating the provisions of §687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person, who has taken or reserved, or has been paid, either directly or indirectly, such usurious

interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted; provided, however, that this shall not apply to a bona fide endorsee or transferee of negotiable paper purchased before maturity, unless the usurious character should appear upon its face, or that the said endorsee or transferee shall have had actual notice of the same before the purchase of such paper, but in such event double the amount of such usurious interest may be recovered after payment, by action against the party originally exacting the same, in any court of competent jurisdiction in this state, together with an attorney's fee, as provided in §687.06.

HISTORY.—§3, ch. 4022, 1891; GS 3106; §3, ch. 5960, 1909; RGS 4852; CGL 6939.

687.07 Forfeiture and penalty in case of excessive interest or charges.—Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees or otherwise, or for forbearing to enforce the collection of such moneys or otherwise, shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than one hundred dollars, or be imprisoned in the county jail not more than ninety days.

HISTORY.—§5, ch. 5960, 1909; RGS 4855, 5689; CGL 6942, 7903.
cf.—§775.08 Alternative punishment.

APPENDIX F

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT
JANUARY TERM, A. D. 1968

WILLIE MARVIN LORD and CLARA MAE LORD, his wife; and H. N. "NERON" AMERSON and MILDRED B. AMERSON, his wife,
Appellants,

v.

ERNEST O. HODGE, SR.,
Appellee.

CASE No. 67-442

Opinion filed April 24, 1968.

Interlocutory appeal from the Circuit Court for Lake County; W. Troy Hall, Jr., Judge.

Richard H. Langley, Clermont, for Appellants.

Harry E. Gaylord, Eustis, for Appellee.

HOBSON, JUDGE.

The appellants, plaintiffs below, bring this interlocutory appeal from an order granting the appellee's, defendant below, motion for an involuntary dismissal and judgment rendered against appellants reforming a note and mortgage.

Plaintiffs filed their complaint alleging a usurious loan made to them by the defendant and asked that the court cancel the note and mortgage as provided under Florida Statute 687.07 or, in the alternative, that the entire interest be forfeited and the penalties be paid as provided

under Florida Statute 687.04, such relief being determined by whether this was a criminal or civil usurious transaction.

The trial court, sitting without a jury, at the conclusion of the plaintiffs' case, granted the defendant's motion for involuntary dismissal and rendered a judgment against the plaintiffs, whereby he reformed the note to a rate of interest of six per cent (6%) per annum on the principal balance from time to time remaining unpaid. The court further stated in its order that upon stipulation by the counsel for the respective parties the instant case was consolidated with four other cases involving the same parties and their counsel and that the ruling in this case would also apply to the other four cases, whereby the notes would be reformed to provide for the same interest rate.

Appellants contend that their testimony and evidence established a prima facie case of usury. The court in its order correctly found that the four elements of usury are: 1) a loan, express or implied; 2) an understanding between the parties that the money loaned is to be returned; 3) payment or agreement to pay a greater rate of interest than is allowed by law; and 4) a corrupt intent to take more than the legal rate. (Clark v. Grey, Fla. 1932, 132 So. 832) The court further found that all parties to the litigation agreed that the first three elements were present.

The learned chancellor below entered an extensive and erudite order containing his findings as to both the facts and law and found "the burden was on the plaintiffs to prove that the defendant had a 'corrupt intent' to violate the usury statute at the time the loan was made and plaintiffs have failed to present any evidence thereof."

We have carefully examined the testimony and evidence relied upon by the plaintiffs for reversal and find from the record-on-appeal that there is competent, substantial evidence contained therein to support the chancellor's order.

The plaintiffs' attorney in his second point on appeal contends that there was no stipulation between counsel that the holding in the instant case would also be applied to the four other cases pending before the chancellor.

We cannot find in the record before us such a stipulation and counsel for the defendant in oral argument agreed that the record before us does not contain such a stipulation other than is set out in the order appealed.

While we do not believe a stipulation would have been mentioned in an order if it did not in fact exist albeit it may have been oral, we, nevertheless, must reverse that portion of the order which consolidates chancery cases numbered 25,407, 25,408, 25,410 and 25,411 with the instant case and the reformation of the notes involved therein.

Affirmed in part and reversed in part.

LILES, C.J., and PIERCE, J., CONCUR.

SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

Office-Supreme Court, U.S.
FILED
MAY 31 1968
JOHN F. DAVIS, CLERK

No. 1444

AMERICAN ACCEPTANCE CORPORATION,
a Delaware corporation,

Petitioner,

v.

EDWARD P. SCHOENTHALER and
AGNES A. SCHOENTHALER, husband and wife,
and WILLIS H. YEAMANS,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. _____

AMERICAN ACCEPTANCE CORPORATION,
a Delaware corporation,

Petitioner,

v.

EDWARD P. SCHOENTHALER and
AGNES A. SCHOENTHALER, husband and wife,
and WILLIS H. YEAMANS,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida was filed December 2, 1965 and is included in the pending record on Appeal. (R 1080-1091) The decision and opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported at *391 F2d 64.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Petitioner has failed to clearly delineate the questions presented on its Petition for Writ of Certiorari. (P 3-16) Instead, under the heading "Questions Presented," Petitioner sets forth statutes, factual allegations and argument and it is difficult for Respondents to properly reply to the Petition when the questions presented to the Court have not been clearly framed in the Petition. In order that Respondents will be able to properly respond to the Petition, Respondents will frame the three questions which they believe are presented by the Petition for Writ of Certiorari.

I

Is there a direct conflict between the Decision of the United States Circuit Court of Appeals for the Fifth Circuit in the instant case and the prior decision of the United States Supreme Court in *HOGG v. RUFFNER, 1 Black 115-121, 66 U.S. Supreme Court Reports, 17 Law Ed 38 (1861)* and the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *In re Oakes, 267 F2d 516 (1959)*.

II

Whether Petitioner violated the provisions of Section 687.07 of the Florida Statutes, commonly known as the criminal usury statute.

III

Whether the trial court was correct in entering judgment in favor of Respondent, Willis H. Yeamans, on his counterclaim.

The above questions were raised in Pages 3-16 of the Petition entitled "Questions Presented."

STATEMENT

Under the "questions presented" heading of its Petition, Petitioner sets forth the alleged history of the financial transaction between the parties and of the case and, in addition, Petitioner recites numerous factual allegations but fails to refer the Court to the record on appeal to substantiate its statements.

Petitioner's recitation of the facts is not accurate and Respondents would respectfully refer the Court to the recitation of facts which was set forth in the Court of Appeals decision and which properly summarizes the case. (See 391 F2d 64 at P 66-72.) In the Petition for Writ of Certiorari numerous inaccuracies in the Statement of Facts will be found when compared to the record on appeal. For example, Petitioner states that the Respondent Schoenthalers' approached Maxwell for a bid on furnishings and fixtures and requested their aid and assistance for secondary financing in the amount of $170,000. (P 4, Petition) However, Petitioner's attorney for the transaction, Aaron M. Kanner, testified that he and Irving Greenfield, President of Maxwell Company, were in Chicago, Illinois, on another matter when they learned of Schoenthalers' motel project in Naples, Florida. (R-134) Kanner was told

that there was not going to be enough money for the project, that there was a need for secondary financing and if the secondary financing could be arranged then the party could also obtain the furniture contract. (R-135) Respondent Schoenthaler testified that he had not heard of the Maxwell Company when approached by a Mr. Allen Greenfield who indicated that the Maxwell Company might be able to help Respondents with their financing. (R 519) Likewise, George Carroll, Schoenthalers' attorney in the transaction, testified that Schoenthaler had been trying to get secondary financing to the extent of approximately $450,000 from other firms when the Maxwell Company approached them. (R 582, 588) John M. Lowe, Vice President of the Maxwell Company, testified that Respondents Schoenthalers' had needed secondary financing to pay off some obligations, to supply them with money to operate, and to finance the purchase of furniture and furnishings and they arranged this with a finance company and then sold them the furniture. (R 164, 165) From an examination of only two of the Petitioners own witnesses, Aaron Kanner and John Lowe, it is abundantly clear that Respondent Schoenthalers' were approached by the Maxwell Company for the purpose of arranging secondary financing for them.

Respondents respectfully suggest that an appropriate summary of the facts appears in the opinion of the Court of Appeals. Respondents, Schoenthalers', as owners, caused the Tahiatian Cove Motel to be constructed in Naples, Florida, and obtained primary financing from the Teamsters' Union Pension Fund. The Teamsters' Union Pension Fund thereupon received a first mortgage on the premises. The Schoenthalers' were overextended creditwise and they needed secondary financing to satisfy the

mortgage on the premises held by the Respondent, Willis H. Yeamans, to purchase furniture and furnishings and to provide them with cash for operating expenses. (391 F2d 67)

Originally, the Pension Fund had agreed to a mortgage of one million seven hundred fifty thousand ($1,750,000.00) Dollars, but subsequently the Union reduced its loan to one million three hundred fifty thousand ($1,350,000.00) Dollars, which necessitated the search for secondary financing in the amount of five hundred thousand ($500,000.00) Dollars. When these circumstances occurred, Mr. Allen Greenfield, representing the Maxwell Company, approached the Schoenthalers' for the purpose of arranging secondary financing, but thereafter, Irving Greenfield, President of Maxwell, told the Schoenthalers' they were only able to arrange $350,000.00 of the financing with the Petitioner. (391 F2d 71)

On April 28, 1964, Maxwell and the Schoenthalers' entered into a commitment letter agreement pursuant to which Maxwell agreed to sell the Schoenthalers' furniture, fixtures, carpet and other sundry equipment selected by Schoenthalers' for a cash price of one hundred eighty thousand ($180,000.00) Dollars, or a time price of two hundred thirty-eight thousand, four hundred eighty-four and 14/100ths ($238,484.14) Dollars, and to loan Schoenthalers' one hundred seventy thousand ($170,000) Dollars, at ten percent (10%) simple interest. The Schoenthalers' were to execute two promissory notes to evidence the indebtedness: one note in the amount of $238,484.14 payable without interest prior to maturity, and the other note in the amount of $170,000 bearing 10 percent simple interest per annum from date.

It was provided that both notes were to be paid with a single monthly payment of seven thousand six hundred twelve and 50/100ths ($7,612.50) Dollars, commencing August 1, 1964, and to be paid continuously for 59 successive months thereafter. The monthly payment was to be first applied to accrued interest on the $170,000 note and then toward the payment of the principal of the note for $238,484.14 and, when the latter note was fully paid, then to the payment of principal and interest on the $170,000 note. The commitment letter also required the Schoenthalers' to furnish a guarantee from the Respondent Willis H. Yeamans in the amount of one hundred thousand ($100,000.00) Dollars, guaranteeing their obligation to that extent. The $100,000.00 was to be placed in escrow to guarantee the obligation. On May 26, 1964, the Schoenthalers' executed and delivered to Maxwell the two promissory notes which are the subject matter of this suit. On the same date, Schoenthalers' executed a guaranty agreement by the terms of which they authorized and directed Maxwell to forward the $100,000.00 as a part of the loan of $170,000.00 directly to Petitioner as escrow holder. The Respondent Yeamans disputes that either he or anyone on his behalf had any authority to designate the Petitioner as escrow holder. It was without dispute that the $100,000.00 was never withdrawn by Petitioner from its account or paid to anyone nor was it in any way segregated, but instead, the money remained in Petitioner's general bank accounts. From Petitioner's books and records there was no way of identifying this sum, or even identifying the bank where the funds were deposited. Petitioner treated the money as its own and had shown the $100,000.00 simply as a liability on its books.

Between June 1 and July 10, 1964, furniture of the total value of $212,887.82 was delivered by Maxwell to the Schoenthalers', making a total disbursement to them on or before July 10, 1964 of $250,000.00. The Petitioner retained $100,000.00, purportedly as escrow agent for Yeamans, thereby providing the total sum of $350,000.00.

In the trial court, Petitioner sought to recover on the mortgage notes and the Schoenthalers' asserted the invalidity of the notes because of civil and criminal usury. The Respondent Yeamans filed his counterclaim alleging American Acceptance was holding $100,000.00 to secure Defendant's Yeamans guaranty of a portion of the mortgage indebtedness, and further alleged that there had been material breaches of the guaranty agreement, resulting in its termination and, in addition, American Acceptance was guilty of criminal usury, as defined in Section 687.07, Florida Statutes 1965, terminating Defendant's guaranty. *The parties stipulated* that the $100,000.00 held by American Acceptance was the property of Dr. Yeamans.

The trial court determined that Petitioner was guilty of criminal usury and forfeited the entire indebtedness, principal and interest, in accordance with Section 687.07 of the Florida Statutes and entered judgment for Dr. Yeamans for the $100,000.00 in accordance with the stipulation of the parties.

ARGUMENT

I

Is there a direct conflict between the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the instant case and the prior

decision of the United States Supreme Court in *HOGG v. RUFFNER, 1 Black 115-121, 66 U.S. Supreme Court Reports, 17 Law Ed 38 (1861)*, and the prior decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *In re Oakes, 267 F2d 516 (1959)*.

Under its Point One, Petitioner sets forth as the principal reason why the Court should grant its Petition for Writ of Certiorari, that there is a conflict in the decision of the Circuit Court of Appeals in the instant case and the prior decision of the United States Supreme Court in *HOGG v. RUFFNER* and the Seventh Circuit Court of Appeals in the case of *In re Oakes*, Supra.

In *HOGG v. RUFFNER*, the Supreme Court was concerned with a sale of land where the vendor had offered to sell the property for a stated cash price or at a higher price on credit terms. The vendor sold the land to the vendee on credit terms which were substantially higher than the cash price. The Supreme Court of the United States held that a person may make a bona fide sale of his property for a higher credit price and the difference in price would not be a violation of the usury laws, since a person could sell his property at different prices and this would not be a loan of money.

In the case of *In re Oakes*, Supra, there was a purchase of a pre-cut home which was to be placed on a lot at a cash price of $4,558.67 or on credit wherein there would be 59 installments of $71.06 each and a final installment of $2,254.00 which was an add-on of $1,938.00 to the cash price. The Court of Appeals found the transaction to be a bona fide sale of property and that there

was no violation of the Indiana usury laws. The law of Florida is no different from the law recited in those cases and this was recognized by the trial court and the Court of Appeals in this case. Thus, the trial court stated as follows:

> "There is no doubt but that the usury laws of Florida apply to a loan of money, or to the forbearance of a debt, and do not apply to the sale of property on credit. *Mid-State Homes, Inc. v. Staines, Fla. App. 1964, 161 So2d 569.* But was this simply a sale and purchase transaction? It is well settled in Florida that the law will look to the substance of the transaction rather than to the form to determine usury, bearing in mind that usury on the part of the lender is largely a matter of intent. *Kay v. Amendola, Fla. App. 1961, 129 So2d 170.*"

> "A careful evaluation of the evidence as a whole leads to the inescapable conclusion that the two notes represent but one loan transaction."

> "The actual cash price for the furniture sold to the Schoenthalers was $212,887.22, and it is impossible to determine what furniture was sold and included in the $238,484.14 note and that which was included in the $170,000 note. The cash price of $180,000 was established in the $228,484.14 note and the balance of the cost of additional furniture of $27,884.82 was charged against the $170,000 note with a balance of $37,112.58 paid to the Schoenthalers." (A 5-6, Petition)

In its opinion, the trial court reviewed various facts which indicated that the transaction was a loan transaction rather than a bona fide sale of personal property.

Likewise, the Circuit Court of Appeals stated that one of the questions presented on appeal was whether the transaction was a loan transaction or a bona fide sale of personal property on credit. The court then stated that the law of Florida requires an examination of the substance of a transaction rather than the mere form to determine usury. The Court of Appeals examined the evidence and found that this was a loan transaction subject to the usury laws of Florida. Consequently, the question presented in the trial court and in the Court of Appeals was whether the facts established that the transaction was a loan or a sale of property on credit, and both courts found that the evidence clearly established a loan transaction.

From the evidence it appears that the Union Pension Fund was to provide the Schoenthalers' with $1,750,000 of mortgage funds, which would provide them with the necessary funds to construct the motel project, satisfy the existing mortgage indebtedness on the property, equip and furnish the motel and provide the Schoenthalers' with the initial funds to operate the motel. (R 516, 517) However, the Union thereafter reduced its commitment to $1,350,000.00 which sum was not sufficient to provide Schoenthalers' with the necessary funds for the project and they began to look elsewhere for secondary financing. (R 516, 517)

The Schoenthalers' were looking for $500,000.00 of secondary financing which was to replace the sum of money eliminated from the Pension Fund mortgage funds. (R 519)

While Petitioner's attorney, Aaron Kanner, was in Chicago with the President of Maxwell, he learned of Schoenthalers' need for secondary financing and that whoever could provide this secondary financing could also obtain the contract for the purchase of furniture. (R 135)

George F. Carroll, Schoenthalers' attorney in the transaction, testified that the Schoenthalers' had sought the secondary financing from many other firms when Maxwell approached them. (R 582) He further testified that the amount of furniture and fixtures which were to be bought depended on the amount loaned to the Schoenthalers'. (R 588) From an examination of the testimony of Petitioner's own witnesses, Aaron Kanner, (R 157-188), John M. Lowe, (R 157-188), Irving Greenfield, (R 836), Rufus Frederick Alkins, (R 255-311) and John J. Grauer (R 312-356) it clearly appears that there was to be one loan transaction of $350,000.00, and these funds were to provide the Schoenthalers' with the necessary funds to satisfy the existing mortgage indebtedness, purchase the furniture and furnishings for the motel project and to provide them with the initial cash to commence the motel operation.

In its opinion, the Court of Appeals quoted from a portion of the testimony of the witnesses which clearly establishes that the Schoenthalers' were seeking secondary financing from the Petitioner and that the Petitioner supplied the necessary funds as a loan transaction. (391 F2d 71) The Florida courts have considered similar situations and determined them to be loan transactions. An example of a similar transaction is set forth in the case of *BROWN v. HOME CREDIT CO., 137 So2d 887 (2nd D.C.A. 1962), Affirmed, 148 So2d 257 (Fla. S. Ct. 1963).*

In that case one of the Defendants, Alderman, contracted with a decedent to construct an additional room to his home. Defendant, Home Credit Company, was to finance same. In addition, Defendant Alderman was to remove certain encumbrances from the property. In exchange for this, Alderman was to receive a note in the amount of $4,999.20 for the construction of the additional room and $3,750.00 for removing the encumbrances. The actual amount advanced by Home Credit Company for these items was $5,000.00, with the balance of $3,749.20 being reserved interest. Defendant Alderman assigned the notes to Home Credit Company and received payment. At *137 So2d 890*, the Florida Appellate Court stated as follows:

> "The lower court in its decree ruled that the burden of proving fraud had not been met by the defendant, but that the notes and mortgages held by Home Credit were drawn in an attempt to circumvent the usury statutes, for the reason that Home Credit in effect dictated and created the terms of the loan obligation to the original parties, with full knowledge that, if the loan had been handled as a normal loan, the amount of interest derived would, in fact, have been usurious . . . "

The court then held that the alleged time price differential was merely a disguise for usurious interest in two non-bearing interest notes and that Alderman and Home Credit, acting in concert, intended to disguise a usurious loan as a sale of a home improvement.

On further appeal, the Florida Supreme Court stated at *148 So2d 258:*

> "Our examination of the record and facts recited in the opinion of the District Court fully sustains its conclusions with respect to the petitioners position and participation in the transaction from the outset rather than as a third party holder in due course, *and we conclude also that the nature of the transaction between the parties was properly defined as a loan obligation subject to the usury statutes.*" (Emphasis supplied.)

The relationship between the parties in the Brown Case and the present one are very similar. In this case Petitioner was involved in the transaction from the beginning and established the terms of the transaction. Petitioner and the Maxwell Company acted in concert in effecting the usurious transaction and, in fact, it appears that they both shared in the interest earned by the notes.

In another case, *GORDON v. WEST FLORIDA ENTERPRISES OF PENSACOLA, INC., 177 So2d 859 (1st D.C.A. 1965)*, a note and mortgage was given by Plaintiff to cover the charges for the construction of a recreational hall to Plaintiff's residence. The face amount of the note was $3,919.80 while the principal amount of the note was $2,450.00. Defendant assigned the note and mortgage to Equitable Credit and Discount Company who subsequently reassigned it to the Defendant. The Florida Appellate Court cited the *BROWN v. HOME CREDIT COMPANY* case, supra and held that the Florida usury law was applicable to the note and mortgage. In *GRIFFIN v. KELLY, 92 So2d 515 (Fla. S. Ct. 1957)*, suit was brought

on the loan and the Defendant answered that that had been a joint venture and that there was usury. The trial court held that the defense of usury was inapplicable as a matter of law and entered judgment on the pleadings in favor of the plaintiff. The transaction involved the apparent sale of stock to the defendant and a time obligation to pay for same. The Florida Supreme Court reversed the trial court and stated at page 518:

> "We quote with approval the Restatement of Contracts, Section 529, which reads as follows:
> " 'Where the intent of a party to a bargain is to make a loan of money or an extension of the matury of a pecuniary debt for a greater profit than is allowed by law, the agreement is illegal although the transaction is put, in whole or in part, in the form of a sale, a contract to sell or other contract.' "

The court then quoted Professor Corbin's statement that whether a transaction is a lawful one or is a usurious one is to be determined by the intentions and purposes of the parties.

In this case, both the trial court and the Court of Appeals examined the evidence and found that this was a loan transaction and that petitioner had violated the usury statutes of the State of Florida. The cases cited by petitioner involve the application of the laws of other states and there is no issue of any conflict between those decisions and the decision of the Court of Appeals in this case. In this case, both the trial court and the Court of Appeals applied the law of Florida to the particular facts of this transaction, and Respondents respectfully submit that

both courts were eminently correct in determining that this was a loan transaction, and that the entire indebtedness was to be forfeited in accordance with Section 687.07 of the Florida Statutes.

II

Whether Petitioner violated the provisions of Section 687.07 of the Florida Statutes, commonly known as the criminal usury statute.

Petitioner contends that Section 687.07 does not apply to a contract for the loan of money at a usurious rate of interest unless the lender has actually collected the money from the borrower. Similarly, as in point one, this question involves a construction of the Florida Statutes and does not involve a question of Federal law or any constitutional question.

Petitioner contends that usurious interest must be paid before there can be a violation of the Florida usury law. This is simply not the law of Florida nor has it ever been the law of Florida. Statute 687.07 of the Florida Statutes states, in part, as follows:

> "Any person, or the agent, officer or other representative of any person, lending money in this state, who shall willfully and knowingly *charge* or *accept* any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five percent per annum upon the principal loaned . . . shall forfeit the entire sum, both the principal and interest, . . : " (Emphasis supplied.)

As the Court of Appeals stated in its opinion, the Florida courts have had numerous opportunities to construe this point in the usury statutes and they have resolved it against the Petitioner.

An illustrative case is *BROWN v. HOME CREDIT COMPANY, Supra*, where the amount advanced to the borrower was $5,000.00 while the amount of the promissory note was $8,750. The borrower made only one monthly payment out of 120 payments required to be made when the default occurred. The Florida Supreme Court held that the Defendants were guilty of criminal usury and ordered the forfeiture of the entire principal and interest in accordance with Section 687.07 of the Florida Statutes. Also, see *FIRST MORTGAGE CORPORATION OF VERO BEACH v. STELLMON, 170 So2d 302 (2nd D.C.A. 1964)(Cert. den., 174 So2d 32, Fla. 1965).* This question is solely one of the construction of the Florida Statutes and the Court of Appeals clearly applied the law of Florida in this case. Petitioner also refers to the case of *CONNER AIR LINES, INC., v. AVIATION CREDIT CORP., 280 F2d 895 (5th Cir. 1960)* and to the statement of the Court of Appeals, contained in a footnote to its opinion, that the Conner decision was contrary to the recent Florida cases and that *Erie* required the court to follow the Florida decisions. Petitioner does this for the purpose of suggesting that the Court of Appeals was in error in applying the Florida law. In the first place, the *Conner* case related solely to the application of Section 687.04 of the Florida Statutes, commonly known as the civil usury statute, as contrasted to the Section 687.07, commonly known as the criminal usury statute, which is involved in this case. When one charges interest which is in excess of 10 percent per annum but less than 25 percent per annum,

one is guilty of civil usury as provided by said statute. Section 687.04 provides that when usurious interest is taken or reserved or has been paid, the borrower is entitled to a forfeiture of double the amount so taken, reserved or paid. In the *Conner* case, Supra, the Fifth Circuit held that add-on interest in an agreement which was held to be a loan contract was not a taking, reserving or payment of usurious interest as defined in the civil usury statute. However, the Florida courts subsequently decided in the case of *FIRST MORTGAGE CORPORATION OF VERO BEACH v. STELLMON, Supra,* that add-on interest is interest taken or reserved and it is within the provisions of Section 687.04 of the Florida usury statutes, entitling the borrower to a forfeiture of double the amount of interest reserved, taken or paid. Consequently, in a footnote to its discussion of the application of either the civil usury penalty or the criminal usury penalty when interest exceeds 25 percent, the court noted the *Conner* case was opposed to the recent Florida cases and that the court would have to follow the Florida cases. (See 391 Fd2d 75)

In this case, however, the court was concerned with the application of Section 687.07, Florida Statutes, which states that there is to be a forfeiture of the entire principal and interest of the note when anyone willfully and knowingly charges or accepts a sum of money equal to 25 percent per annum interest which was determined to be true in this case.

In conclusion, Respondents respectfully submit that the second question raised by Petitioner only relates to the construction of the Statutes of Florida and both the trial court and the Court of Appeals properly applied the Florida law.

III

Whether the trial court was correct in entering judgment in favor of Respondent, Willis H. Yeamans, on his counterclaim.

In its stipulation with respondents Schoenthalers', Petitioner stipulated that it "acknowledges that it holds possession of $100,000.00 for Dr. Willis H. Yeamans in conformity with a guarantee escrow agreement . . . " (R 885) In the stipulation between Petitioner and Dr. Willis H. Yeamans on his counterclaim, the parties stipulated "that the sum of $100,000.00 being held by American Acceptance Corp. is the property of Dr. Yeamans." (R 1043)

Once the trial court determined that the entire principal and interest of the loan was to be forfeited pursuant to Florida Statute 687.07, it then entered judgment in favor of Respondent Willis H. Yeamans on his counterclaim in accordance with the stipulation of the parties. As the Court of Appeals stated:

> ' "it was obviously the conclusion of the District Court that the $100,000.00 was part of the principal amount of the loan, although the loan was never funded with that amount so as to make interest computations allowable thereon. The fact that the loan was never funded with the $100,000.00 does not mean that the amount would not be forfeited under Section 687.07. The $100,000.00 had to be either principal or interest. Whichever it was, it was forfeitable as the entire transaction was found to be criminally usurious." ' (391 F.2d 77)

Also see *MINDLIN v. DAVIS, 74 So2d 789, (Fla. S. Ct. 1954); WILLIAMSON v. CLARK, 120 So2d 637 (2nd D.C.A. 1960);* and *CORAL GABLES NATIONAL BANK v. CONSTRUCTORS OF FLORIDA, 119 So2d 741, (3rd D.C.A. 1960).*

CONCLUSION

The questions raised by Petitioner in its Petition for Writ of Certiorari relate solely to the construction of the Statutes of the State of Florida and the application of those statutes to the facts of this case. There is no important question of federal law or conflict in the decisions of the federal courts nor was any constitutional issue presented to the trial or appellate court for their decision. In this case both the trial court and the Court of Appeals examined the evidence and properly applied the Florida law as established by the prior decisions of the Florida courts to determine that Petitioner was guilty of criminal usury as set forth in the Florida Statutes. For these reasons Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed on the _____ day of _____, 1968, to William Gresham Ward, 1240 duPont Building, Miami, Florida 33131, and to Richard Aaron Kanner, 1150 N. W. 14th Street, Miami, Florida 33136, Attorneys for Petitioner.

HARRY G. CARRATT